In The

Supreme Court of The United States

October Term, 1953

No.....

HARVEY STOLLER, d/b/a RICHLAND LAUNDRY AND DRY CLEANERS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A F L,
Respondent Below,

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Circuit Court has affirmed a decision and order of the National Labor Relations Board, hereinafter referred to as "Board", dated March 6, 1951. The Board's ruling (R. 74-86) is reported in 93 NLRB 680 and is attached hereto as Appendix "B".

Harvey Stoller, an individual doing business under the name and style of Richland Laundry and Dry

Cleaners, hereinafter called "Petitioner", respectfully prays that a writ of certiorari issue to review an order and decree of enforcement entered on November 9, 1953, by the United States Court of Appeals for the Ninth Circuit pursuant its decision rendered September 23, 1953. (R.[1] 252-264.) A petition for rehearing was denied on October 21, 1953. The Court's opinion (R. 246-251) is reported at 207 F. (2d) 305, and is attached hereto as Appendix "A".

JURISDICTION

This case was taken by the Board to the Court of Appeals for the Ninth Circuit under the provisions of the National Labor Relations Act, as amended, 29 U.S.C.A. Secs. 151 et seq., 160(e). Petitioner invokes the jurisdiction of this Court under Section 240(a), Judicial Code, as amended, 28 U. S. C. A. Sec. 1254(1), and Section 10 (f) of the National Labor Relations Act, as amended, 29 U. S. C. A. Sec. 160 (f).

CONSTITUTION AND STATUTES

Involved in this proceeding are Amendment V to the Constitution of the United States and the following statutes:

(1) The National Labor Relations Act, as amended, 29 U. S. C. A. Secs. 151 et seq., particularly Sections 151, 152(6),(7), 156, and 160(a).

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[1] "R" refers to the printed transcript of record, and includes the proceedings before the Board and the Court of Appeals.

(2) The Administrative Procedure Act, 5 U.S.C.A., Secs. 1001 et seq., particularly Sections 1001(c),(f), 1002(a),(b),(c) and 1009(e).

The Amendment and pertinent statutes are set forth in Appendix "D".

STATEMENT OF THE MATTER INVOLVED

The following developments and proceedings preceded this petition:

1. On January 25, 1950, Petitioner and Laundry and Dry Cleaners Union, Local 197, affiliated with Laundry Workers International Union, A. F. L. (respondent below with Petitioner) entered into an agreement requiring as a condition of employment membership in the Union (R. 153-154).

2. Between April 11th and 18th, 1950, Irene Hallenbeck, Florence Jonson, Noland A. Teal, Donald Donahue, and Alma Donahue[2] filed unfair labor charges with the Board against the Petitioner and the Union. The Employees claimed that Petitioner had discharged them for refusing to join the Union. (R. 3-30.)

3. A consolidated complaint against the Employer and the Union was filed July 19, 1950. It was alleged that General Electric Company operates and maintains the Hanford Atomic Energy Project at Richland, Washington, for the Atomic Energy Commission;

[2]Hereinafter termed "Employees."

that Petitioner is a subcontractor of the General Electric Company; that Petitioner derives $300,000 annual income from business with the inhabitants of Richland and General Electric; that $24,000 of Petitioner's annual supplies originate without Washington; and that the operations of Petitioner affect interstate commerce within the meaning of National Labor Relations Act. as amended.[3] (R. 31-37.)

4. The Board issued "standards" for the exercise of its jurisdiction on October 5, 1950, including "[e]stablishments substantially affecting national defense."[4]

5. Five days later, October 10th, the hearing upon the Employees' charges commenced (R. 87).

6. On November 6th, A. Bruce Hunt, the Trial Examiner, made his Intermediate Report and Recommended Order. He found Petitioner's laundry to substantially affect the national defense effort and asserted jurisdiction under the Board's new policy. He virtually conceded that labor strife causing a cessation of Petitioner's operations would **not** affect the laundry and dry cleaning business in Richland. (R. 45, 48.) The Trial Examiner's Findings of Fact are annexed hereto as Appendix "C".

The Intermediate Report decides that Petitioner

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[3]Hereinafter termed "Act", except in a few instances where the full title appears.

[4]26 L. R. R. M. 51. The standards were set forth in a special press release rather than in the Federal Register as ordained by the Administrative Procedure Act, 5 U. S. C. A. Sec. 1002. The full context of the declaration of policy is hereinafter set out at Appendix "E".

and the Union illegally entered a closed shop agreement when the Union did not represent a majority of the employees and had not been certified by the Board as official bargaining representative in the plant of Petitioner; that the Petitioner unlawfully discharged the five employees for non-membership in the Union, all in violation of the Act's Section 8(a), subsections 1, 2 and 3. (R. 42-70.)

7. The Employer and the Union jointly filed exceptions to certain findings and rulings of the Trial Examiner on November 27th. The exceptions primarily challenged the jurisdiction of the Board, contending, **inter alia**, that Petitioner was not engaged in interstate commerce within the meaning and intendment of the Act. (R. 70-73.)

8. March 6, 1951, the Board issued its Decision and Order. It held that the purpose of the Act would be best effectuated by the exercise of jurisdiction because of Petitioner's "relationship to the national defense effort," and "any employer doing business on * * * an atomic energy reservation * * * warrant[s] the full exercise of the Board's power." (Appendix B; R. 74-87.)

9. The Board petitioned the Court of Appeals for enforcement of its Decision and Order on June 30, 1952 (R. 204-217).

10. On August 2nd, the Petitioner filed his Answer and Cross-Petition (R. 220-228).

11. August 8th, the Union also answered and cross-petitioned (R. 230-240).

12. The Court of Appeals, on September 23, 1953, entered its opinion directing enforcement of the Board's Order. The Court held that the alleged unfair labor practices would affect Petitioner's interstate purchases, though this is not in accord with the Trial Examiner's holding that labor strife at Petitioner's plant would not affect the laundry and dry cleaning business in Richland. Petitioner's other arguments were either ignored or summarily dismissed. (Appendix A; R. 45, 48, 246-251.)

13. On November 9, 1953, the Decree here sought to be reviewed was entered. The Decree enforces the Board's Order directing the reinstatement of, and payment of back wages to, the Employees. (R. 252-264.)

14. Early December, 1953, Petitioner was given notice that the Union is also petitioning this Court to review the Court of Appeal's Order and Decision herein.

FACTS

Additional material facts shown by the record and necessary to the Court's proper consideration of this petition are as follows:

The Atomic Energy Commission owns an area within the State of Washington commonly know as the Hanford Engineering Project, and which is de-

voted to the development of atomic energy. The Commission also owns the adjacent City of Richland, including the buildings as well as the real property.[5] Richland is a municipality where many of the project's employees reside. (R. 45-46, 95-102, 140-141).

The General Electric Company operates Hanford and Richland as an agent of the Commission. General Electric owns none of the equipment or personalty at the reservation, and it receives no profit for its services. (R. 120, 197-199.)

The Petitioner leases a laundry and dry cleaning establishment at Richland from General Electric.[6] Until August, 1950, the consideration of the lease was $18,000 per year plus all profits exceeding 6% of Petitioner's gross income. (R. 95-100, 104-105.) Subsequent to August, 1950, a five-year agreement was reached whereby the Petitioner pays a flat rental of $560 per month and retains all profits. (R. 103-104, 131).[7]

At the time of the alleged unfair labor practices, March, 1950 (R. 57), the Petitioner was a lessee rather than a sub-contractor of the General Electric

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[5]See 42 U.S.C.A. Secs. 1801 et seq. The record is not clear whether ownership lies in the United States Government, as such, or the Commission (R. 101-103).

[6]Includes the building and equipment. However, the Petitioner has his own "specialty equipment" and trucks (R. 102).

[7]The Petitioner is now purchasing the equipment from General Electric (R. 103, 131).

Company.[8] He had eighty-five employees, all hired by his own concern (R. 121, 125).[9] General Electric had no voice in the salaries paid by the Petitioner nor in the prices he charged for his services (R. 136). In some years the operating costs consumed all Petitioner's receipts. In some years he did not make 6% of the gross income, and General Electric received only the base consideration. (R. 104-105, 109.)

During the fiscal year ending August, 1950, the Petitioner's business with residents of Richland and nearby areas grossed $200,000.[10] Laundry work performed for Dresswell, a local competitor, brought in another $4,500 (R. 112-113).[11] The remainder of his receipts were realized from the following sources: United States Army—$3,600,[12] General Electric—$19,600[13] the Desert Inn Hotel—$13,500[14] and the Mart—$578[15] (R. 115-120.) All of this business is entirely localized to the Richland trade area which encompasses a radius of less than 100 miles, and none originates outside of the State of Washington (R. 45, 112-120, 139).

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[8]The Trial Examiner held the Petitioner to be a "sub-contractor of General Electric" (R. 47), but the Board, as did the Circuit Court, found him to be operating under a lease or license. (R. 75, Appendix A.)

[9]Employees are put to work as soon as hired. However, regulations require new employees of every Richland firm to report to General Electric for fingerprinting and an F.B.I. clearance (R. 125, 137-138).

[10]The Petitioner's operations were not confined to Richland (R. 139).

[11]Non-commercial business (R. 143).

[12]Work started June 1, 1950 (R. 124, 125), several months after the occurrence of the alleged unfair practices.

[13]Income from the laundering and dry cleaning of the uniforms of Richland patrolmen and firemen (R. 115-116). This business is secured by bid (R. 133). The patrolmen are deputized by the county. (R. 199).

[14]A Seattle corporation (R. 117-118).

[15]A Richland cafeteria (R. 117-118).

Competing with the Petitioner for the commercial and residential laundry and dry cleaning work of Richland are at least a dozen other firms[16] which solicit in the entire Richland area (R. 132-133, 134). Ninety per cent of the commercial business (as distinguished from laundry and dry cleaning services for private individuals) is done by a competitor (R. 135). In addition, General Electric itself operates two laundries, and a private concern maintains in Richland a self-service laundry. (R. 134-135, 141-142.) It seems safe to say that Petitioner's operations no more than remotely affect the national defense effort, much less interstate commerce.

General Electric also leases to the Petitioner eleven houses, one of which he himself occupies, and the remainder of which are sublet to some of his employees (R. 121). This arrangement has no bearing on the lease of the laundry facilities, being on a monthly basis with the Petitioner free to return the houses anytime he so desires (R. 103, 127-128).

The Petitioner purchases his supplies of soap, cotton goods, paper, cleaning solvents and paper hangers from Spokane, Portland, and Seattle. When asked what percentage of these materials originated

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[16]Dresswell (R. 112-113); Sudden Service, which does the Army's dry cleaning (R. 125, 133); Jerry's (R. 132); an unnamed Wenatchee laundry (R. 133); Pantorium Dye Works, in which Harvey Stoller is an officer and stockholder (R. 114-115); an unnamed Connell concern (R. 132-133); three unnamed Kennewick laundry and dry cleaners (R. 133); three unnamed Pasco firms (R. 133); Crystal (R. 135); and Radiant, which once underbid the Employer and got the General Electric contract (R. 133).

outside of Washington, he did not at first answer, apparently being uncertain. Upon being led to believe by the Trial Examiner that this feature was without importance, the Petitioner (without counsel) hazarded a guess of approximately "half". (R. 44, 109-112.)[17]

Upon these facts the Trial Examiner, and later the Board, determined the Petitioner to be a vital cog in the defense program and amenable to the

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[17]As the Court of Appeals affirmed jurisdiction solely upon the Petitioner's out-of-state purchases (Appendix A), the colloquy is fully set out:

(By Mr. Boyd, the General Counsel)

"Q. About what was the amount of your annual purchases for the last fiscal year; what were your gross purchases of supplies?

A. It will run 10 per cent.

Q. It ran 10 per cent of $241,000? That would be approximately $24,000?

A. Yes, sir.

Q. Well, what was the nature of those suppliers [sic]?

A. Well, soap, cotton goods, paper, cleaning solvents, hangers.

Q. From where did you purchase those supplies?

A. Seattle, Spokane and Portland.

Q. Could you state approximately what percentage of them came to you from outside the State of Washington?

A. (No response)

Mr. Bassett: That would be from Portland, Oregon, I take it?

Mr. Boyd: Presumably, or he may have placed his order in Spokane and have them shipped to him from Chicago.

A. No.

Trial Examiner Hunt: Well, let me see. I think at this point we might have the positions of the parties stated on the record. As I understood them to be from a discussion during the recess, the contention of the union and the employer is that the employer's business is not subject to the jurisdiction of the Board because it is purely local in character.

Mr. Bassett: Yes, that is correct.

Trial Examiner Hunt: The position of the General Counsel is that the business is subject to the jurisdiction of the Board because of its relation to the atomic energy program?

Mr. Boyd: That, plus the fact that actually a substantial part of the

Act. (R. 62-61, 74-75.) The Court of Appeals for the Ninth Circuit held that the Board alone determines whether jurisdiction should be exercised, the fact of jurisdiction being assumed from Petitioner's relatively minor interstate purchases. The Court ignored the Trial Examiner's concept of jurisdiction:

> "The principal question in this case is whether the Board has jurisdiction. Involved is an aspect of the Board's recently expressed policies on jurisdiction, namely, enterprises which substantially affect the national defense." (R. 45.)

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supplies in used [sic] in operating the business come from outside the State of Washington.

Trial Examiner Hunt: Well, but the total amount of supplies, he testified, I think, for the fiscal year 1949 was only $24,000.

Mr. Boyd: That is correct.

Trial Examiner Hunt: And that figure itself is so small, that even if it all came from without the State of Washington, as I understand Board Decisions, the Board would not assert jurisdiction.

Mr. Boyd: I think in the absence of the relation of this employer's operations to the program of the General Electric Company in this locality, the Board probably would find that this operation is essentially local, but I think that it might be helpful if we did have in this record the percentage of his purchases that come from out of the state.

Trial Examiner Hunt: Well, I had some doubt about it and that is the reason that I raised the point. Whether it is 50 per cent or 100 per cent of $24,000 didn't seem to me to be the material factor in this case. But if you want it in, go right ahead, Mr. Boyd.

Mr. Boyd: Well, there was another question that relates to this.

Q. But may I ask Mr. Stoller, approximately what part of your annual purchases are shipped to you from outside of the State of Washington?

A. Well, let's say half.

Q. Approximately half? A. Yes, sir." (Emphasis supplied; R. 109-112.)

Note: This is the only evidence in the record relating to petitioner's out-of-state purchases. Yet the Court of Appeals concluded there was substantial evidence that the alleged unfair activities had close and intimate relation to commerce within the meaning of the Act.

And the Court paid no heed to Petitioner's contention that, conceding the Board's power, **arguendo**, a rule that all employers situate on atomic energy reservations shall be held subject to the Act is arbitrary, capricious and wanting in descretion.

QUESTIONS PRESENTED

In the enactment of the National Labor Relations Act, as amended, the Congress of the United States said:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions [labor strikes, strife and unrest] to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred * * *."
>
> 29 U. S. C. A., Sec. 151
>
> "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or beween any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."
>
> 29 U. S. C. A., Sec. 152(6)
>
> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

29 U. S. C. A., Sec. 152(7)

"The Board shall have authority from time to time to make, amend, and rescind * * * such rules and regulations as may be necessary to carry out the provisions of this subchapter."

29 U. S. C. A., Sec. 156

and

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce.* * *"

29 U. S. C. A., Sec. 160(a)

The Board ruled in the instant case that the Act is best served if applied to employers associated with the national defense effort and that "any employer doing business on * * * an atomic energy reservation, whether or not his business is essential to the inhabitants of the community, is nonetheless so identified with the Government's national defense program as to warrant the full exercise of the Board's power to assert the jurisdiction conferred on it by the Act." (R. 75, Appendix B.) The Court of Appeals decided that Petitioner's out-of-state purchases amounting to but $12,000 a year are not so insignificant to come within the **de minimis** rule, and that the Courts have no right to pass on the propriety of the Board's assumption of jurisdiction. (Appendix A; R. 246-251.) In view of the express language of the statutes above quoted, the Fifth Amendment, and the Administrative Procedure Act, 5 U.S.C.A., Secs. 1001

et seq., especially Section 1009(e) reading, in part, as follows:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. It shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations * * *; (5) unsupported by substantial evidence * * *. In making the foregoing determinations the court shall review the whole record * * *."

the decision of the Board and the affirmance thereof by the Court of Appeals raise the following questions:

1. Whether the Board has the right to adopt an arbitrary "standard" for the assumption of jurisdiction under the Act, such as, "Establishments substantially affecting national defense"?

2. If such a "standard" is valid, can the Board assume jurisdiction over a business it finds to be "entirely localized" to Richland, Washington (R. 45), by the mere expedient of applying the "standard"?

3. If such a "standard" is valid and can be applied by the Board, should the Court of Appeals, upon review, decline to rule upon the substantialness of Petitioner's relationship to national defense in view of the Admin-

istrative Procedure Act, especially 5 U.S.C.A. Sec. 1009(e) above quoted?

4. Whether a "standard" announced solely in a special press release should be upheld when the Administrative Procedure Act, 5 U. S. C. A., Sec. 1002, requires statements of general policy to be published in the Federal Register?

5. If the answer to question (1) above be in the affirmative, should the Board, in view of the Fifth Amendment, be permitted to direct Petitioner to pay back wages to employees discharged prior to the adoption of the "standard" upon which the Board predicates jurisdiction over Petitioner?

6. Has the Board exercised the discretion required by the "due process" clause of the Fifth Amendment when it holds that "any employer doing business on * * * an atomic energy * * * warrant[s] the full exercise of the Board's power to assert the jurisdiction conferred on it by the Act"? (Emphasis supplied.)

7. Whether the Court of Appeals properly sanctioned the Board's assumption of jurisdiction over Petitioner upon the relatively small amount of his interstate purchases, after the Trial Examiner and Board primarily based jurisdiction upon Petitioner's relationship to national defense.

8. Whether the Court of Appeals erred in holding that Petitioner's out-of-state purchases amounting to $12,000 in 1950, which approximated 1/22nd of his

total business, did not fall within the maxim **de minimis non curat lex** when admittedly the remainder of his business is strictly local?

9. Even if the interstate shipments to Petitioner fall without the **de minimis** rule, did the Court of Appeals decide correctly that the Act is applicable in view of the finding of the Trial Examiner and the Board that Petitioner's business is local?

10. Whether the Court of Appeal's affirmance of the Board's jurisdiction over Petitioner on the basis of his interstate purchases can stand after Petitioner was led to believe at the hearing before the Trial Examiner that such purchases had no bearing on the case? (R. 109-112.)

REASONS FOR GRANTING WRIT

1. The Circuit Court of Appeals Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

On October 5, 1950, the Board announced for the first time specific "standards" governing the exercise of its jurisdiction. Although the Board reiterated its policy of not taking cognizance of businesses primarily local, the Board declared it would take jurisdiction over "[e]stablishments affecting national defense." (26 L. R. R. M. 50, 51, Appendix D.) In this case the court of Appeals affirmed the Board's assumption of jurisdiction over Petitioner's localized laundry and dry cleaning operation because of its identification "with

the Government's national defense program." (Appendix A, Footnote 4; R. 250.) The following questions of first impression and needing determination by this Court are thereby raised:

(a) Whether Congress in enacting the National Labor Relations Act, as amended, contemplated supervision of the country's defense effort by the Board? (29 U.S.C.A., Sec. 151 specifically declares the purposes of the Act to be elimination of labor strife affecting interstate commerce.)

(b) Whether 29 U.S.C.A., Sec. 156 empowers the Board to make discriminatory rules and regulations? (It is admitted that the Board would not assert jurisdiction over an employer conducting a business identical to Petitioner's save for location on an atomic energy reservation. R. 45.) And,

(c) Assuming validity of the "standard" in question, will the Fifth Amendment permit the retroactive application thereof to Petitioner's damage? (The contract between the Union and Petitioner is valid under State Law, **Yeager v. International Broth. of Teamsters**, 39 Wn. (2d) 807, 239 P. (2d) 318, and the discharge of the Employees antedated the "standard" by six months. Yet the Board's order, affirmed by the Court of Appeals, mandates that the Employees must be made whole for losses of pay.)

2. The Decision of the Court of Appeals Sanctions Legislation by the Board and is Thereby in Conflict with Decisions of This Court.

By the adoption of the rule that it will assert jurisdiction over labor disputes in "[e]stablishments substantially affecting national defense", whether the business is essentially interstate or intrastate, the Board has, in effect, amended the Act. The Court of Appeals, in giving its approval to this act of legislation, decided important questions of Federal law in conflict with applicable decisions of this Court.

> "Legislation introducing a new system is at best empirical, and not infrequently adminstration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive."
>
> **Addison v. Holly Hill Fruit Products**, 322 U.S. 607, 617, 88 L. ed. 1488.

See also:

Iselin v. United States, 270 U. S. 245, 70 L. ed. 566;

Manhattan G. E. Co. v. Commissioner of Int. Rev., 297 U.S. 129, 80 L. ed. 528;

Koshland v. Helvering, 298 U. S. 441, 80 L. ed. 1268;

Electric Storage Battery Co. v. Shimadzu, 307 U. S. 5, 83 L. ed. 1071;

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 84 L. ed. 656;

Helvering v. Credit Alliance Corp., 316 U. S. 107, 86 L. ed. 1307;

Helvering v. Sabine Transp. Co., 318 U. S. 306, 87 L. ed. 773.

3. The Failure of the Court of Appeals to Review the Case in Accordance with Statutory Standards Presents a Question Which Should be Resolved by this Court.

The Administrative Procedure Act and the Labor Management Relations Act, 1947, which amends the National Labor Relations Act, require that the Court review the whole record or such portions thereof as may be cited by any party. The reviewing Court should set aside administrative action unsupported by substantial evidence, considering the whole record. **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474, 95 L. ed. 456. The Court of Appeals did not, in the instant case, comply with the cited statutes and decision in three respects:

(a) The Court completely ignored Petitioner's contention that there is no basis in the record for the Board's finding that Petitioner's laundry and dry cleaning plant substantially affects national defense. (Appendix A.) This particular finding is of the utmost importance because upon it the Board asserted jurisdiction. (R. 45, 75, 110-111.)

(b) The Court of Appeals concluded that Petitioner's interstate purchases and alleged unfair labor practices have a close, intimate and substantial relation to commerce when such conclusion is not borne

out by the record, and is only an inference without support in the findings of the Trial Examiner and the Board. (Appendices A and B; R. 87-199, 246-251, particularly 45-48, 110-111.)

(c) In determining whether the Board had jurisdiction herein, the lower Court by-passed and gave no weight to the Trial Examiner's and Board's finding that Petitioner's business is local, or intrastate, which finding was not challenged and is fully substantiated by the record. (Appendix A; R. 45, 74-75.)

4. The Decision of the Court of Appeals Herein Fails to Apply this Court's Decisions in the Jones & Laughlin Steel and Fainblatt Cases.

The Court of Appeals decided that the Board's jurisdiction obtains on the showing of labor trouble and the presence of incidence of interstate commerce. (Appendix A.) The Court failed to consider this Court's decision in **N.L.R.B. v. Jones & Laughlin Steel Corp.**, 301 U.S. 1, 81 L. ed. 893, that the Board's jurisdiction inheres upon the proof of: (a) unfair labor practices, (b) interstate commerce, and (c) **the former affects, or might well affect, the latter.**

The Court further erred in failing to apply the maxim **de minimis non curat lex** to Petitioner's out-of-state purchases amounting to $12,000 annually.

> "* * * The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several

States' and the internal concerns of a state. The distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. * * *"

"* * * The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce * * *."

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 30, 31, 81 L. ed. 893

N.L.R.B. v. Fainblatt, 306 U.S. 601, 83 L. ed. 1014.

By its decision in this case the Court of Appeals has approved the intrusion into the internal affairs of the State of Washington by an agency of the Federal Government. The Court took another long step toward destroying the "distinction between what is national and what is local in the activities of commerce", which distinction this Court has held "vital to the maintenance of our federal system."

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S., 81 L. ed. 893

5. The Court of Appeals Departed from the Accepted and Usual Course of Judicial Proceedings.

At all times the General Counsel of the Board and the Trial Examiner took the primary position that Petitioner's business relationship to the General Electric Company and the national defense effort consti-

tuted commerce within the meaning of the Act.[18] The Petitioner, who was not then represented by Counsel, was led to believe the jurisdictional issue in dispute was whether he was a sub-contractor of General Electric. Consequently, Petitioner offered proof on that issue only. (R. 44, 129-143, 197-199). Not until the Board sought enforcement of its order by the Court of Appeals was Petitioner confronted with the argument that his interstate purchases vested the Board with jurisdiction over the labor activities in question. The Court of Appeals should not have allowed the Board to shift its theory of jurisdiction to the prejudice of the Petitioner at that late stage of the proceedings.

See: **McGrath v. Manufacturers Trust Co.**, 338 U.S. 241, 94 L. ed. 31

United States v. Hoffman, 335 U.S. 77, 92 L. ed. 1830

Virginian R. Co. v. Mullens, 271 U.S. 220, 70 L. ed. 915

WHEREFORE, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated this 6th day of January, 1954.

Respectfully submitted,
RICHARD S. MUNTER
Attorney for Petitioner

CAMERON SHERWOOD and
ROBERT A. COMFORT
(Of Counsel)

[18] See stipulation as to "commerce" facts, R. 197-199.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. HARVEY STOLLER and LAUNDRY & DRY CLEANERS UNION, LOCAL 197, Respondents.	No. 13,445 Sep. 23, 1953

Petition for Enforcement of an Order of the National Labor Relations Board.

Before MATHEWS, HEALY and BONE, Circuit Judges.

MATHEWS, Circuit Judge.

The National Labor Relations Board has petitioned this court for a decree enforcing an order issued by the Board on March 6. 1951,[1] against respondents, Harvey Stoller (an individual doing business as Richland Laundry & Dry Cleaners) and Laundry & Dry Cleaners Union, Local 197 (a labor organization), in a proceeding under Sec. 10 of the National Labor Relations Act, 29 U.S.C.A. Sec. 160. Answering the petition, respondents pray that the order be set aside.

[1]Richland Laundry & Dry Cleaners, 93 N.L.R.B. 680.

At all pertinent times, respondent Stoller operated a laundry and dry-cleaning establishment at Richland, Washington, on an atomic energy reservation of the United States—a reservation operated by the Atomic Energy Commission as part of the national defense program—respondent Stoller being a lessee of the Commission. Irene Hallenbeck, Florence Jonson, Noland Teal, Donald Donahue and Alma Donahue were employees of respondent Stoller.

On January 25, 1950, respondent Stoller made an agreement with respondent Union to require as a condition of employment membership in respondent Union. Respondent Union was not the representative of respondent Stoller's employees as provided in Sec. 9(a) of the Act, 29 U.S.C.A. Sec. 159(a). However, in March, 1950, at the request of respondent Union, respondent Stoller discharged Hallenbeck, Jonson, Teal and the Donahues because they were not, and refused to become, members of respondent Union, and thereafter, for the same reason, respondent Stoller refused to reinstate them. Thus, on and after January 25, 1950, respondent Stoller engaged in unfair labor practices listed in Sec. 8(a) of the Act, 29 U.S.C.A. 158(a), and respondent Union engaged in unfair labor practices listed in Sec. 8(b) of the Act, 29 U.S.C.A. 158(b).

On charges filed by Hallenbeck, Jonson, Teal and the Donahues in April, 1950, and an amended charge filed by Hallenbeck on July 17, 1950, a duly designated agent of the Board issued a complaint against respond-

ents on July 19, 1950. Respondents answered the complaint, and a hearing was had and evidence presented before a trial examiner. The trial examiner's findings of fact, conclusions of law and recommendations were stated in an intermediate report which, together with a recommended order, he issued and caused to be served on the parties and filed with the Board. Respondents filed exceptions, and the Board, on March 6, 1951, rendered a decision and issued the order here sought to be enforced. Thereby respondents were required to cease and desist from their unfair labor practices and to take certain affirmative action which the Board found would effectuate the policies of the Act.

First. Respondents contend that the Board had no jurisdiction to issue the order.

Whether the Board had such jurisdiction depends on whether respondents' unfair labor practices were unfair labor practices affecting commerce.[2] See Sec. 10(a), (b) and (c) of the Act, 29 U.S.C.A. Sec. 160(a), (b) and (c).

As indicated above, respondent Stoller operated a laundry and dry-cleaning establishment in the State of Washington. However, the trial examiner found that during respondent Stoller's fiscal year ending in August, 1950, he purchased supplies, including soap, cleaning solvents and paper, amounting to approxi-

[2]As used in this opinion, the term "commerce" has the meaning indicated in Sec. 2(6) of the Act, 29 U.S.C.A. Sec. 152(6), and the term "affecting commerce" has the meaning indicated in Sec. 2(7) of the Act, 29 U.S.C.A. Sec. 152(7).

mately $24,000 in value, about one-half of which was shipped to him from points outside the State of Washington, and that respondents' unfair labor practices had a close, intimate and substantial relation to commerce and tended to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. These findings were adopted by the Board. They are supported by substantial evidence on the record considered as a whole and hence are conclusive. See Sec. 10(e) of the Act, 29 U.S.C.A. Sec. 160(e).

The trial examiner and the Board concluded, and we agree, that respondents' unfair labor practices were unfair labor practices affecting commerce. See Sec. 2(6) and (7) of the Act, 29 U.S.C.A. Sec. 152(6) and (7). The commerce affected — approximately $12,000 a year—was not so insignificant as to come within the rule **de minimis non curat lex.**

The Board, therefore, had jurisdiction to issue the order.

Second. Respondents contend that, if the Board had jurisdiction to issue the order, such jurisdiction should not have been exercised.

The general rule is that, where the Board has jurisdiction, as it had in this case, whether such jurisdiction should be exercised is for the Board, not the courts, to determine.[8] In this case, the Board determined that its jurisdiction should be exercised because respondent was doing business on an atomic energy

[8]N.L.R.B. v. Townsend, 9 Cir., 185 F. 2d 378; Haleston Drug Stores, 9 Cir., 187 F. 2d 418; Katz v. N.L.R.B., 9 Cir., 196 F. 2d 411.

reservation.[4] We cannot say that the Board was wrong in so determining.

In support of their contention that the Board's jurisdiction should not have been exercised in this case, respondents cite N.L.R.B. v. Guy F. Atkinson Co., 9 Cir., 195 F. 2d 141, wherein this court refused to enforce an order issued by the Board on June 8, 1950, against an employer (the Company) in a proceeding under Sec. 10 of the Act, 29 U.S.C.A. Sec. 160—an order requiring the Company to cease and desist from certain unfair labor practices and to take certain affirmative action. The Company was engaged in the construction industry. Its unfair labor practices occurred in 1947, at a time when the Board, pursuant to a long established policy, was refusing to exercise jurisdiction over the construction industry. The policy of refusing to exercise such jurisdiction was consistently followed by the Board from the Board's creation in 1935 until after the Company's unfair labor practices occurred. The Company, in engaging in such practices, relied on that policy. Thereafter the Board adopted a new policy and, pursuant thereto, proceeded against the Company with the result indicated above. On the facts shown, this court held that the Board's action in the Atkinson case was arbitrary, capricious and an abuse of discretion within the meaning of Sec. 10(e) of the Administrative Procedure Act, 5 U.S.C.A. Sec. 1009(e).

[4]The Board held that any employer doing business on such a reservation was "so identified with the Government's national defense program as to warrant the full exercise of the Board's power to assert the jurisdiction conferred on it by the Act."

The facts of the instant case differ from those of the Atkinson case in many respects, including the following: Respondent Stoller was not engaged in the construction industry, but was engaged in the laundry and dry-cleaning industry. The Board did not, at the time respondent's unfair labor practices occurred or at any time prior thereto, have any policy of refusing to exercise jurisdiction over the laundry and dry-cleaning industry. Instead, the Board frequently exercised such jurisdiction.[5] So far as the record shows, respondents, in engaging in their unfair labor practices, did not rely on any policy of the Board.

Obviously, the Atkinson case is not in point here, nor is there here any basis for holding that the Board's action in the instant case was arbitrary, capricious or an abuse of discretion.

The Board's order will be enforced.

(Endorsed:) Opinion. Filed Sep. 23, 1953. Paul P. O'Brien, Clerk.

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[5]See Arcade-Sunshine Co., 12 N.L.R.B. 259, modified and enforced as modified in N.L.R.B. v. Arcade-Sunshine Co., 73 App. D. C. 128, 118 F. 2d 49; White Swan Co., 19 N.L.R.B. 1079, modified and enforced as modified in N.L.R.B. v. White Swan Co., 4 Cir., 118 F. 2d 1002; Quality & Service Laundry, 39 N.L.R.B. 970, enforced in N.L.R.B. v. Quality & Service Laundry, 4 Cir. 131 F. 2d 182; Star Dyers & Cleaners, 53 N.L.R.B. 514; H. B. Harwell, 55 N.L.R.B. 845; Liberty Laundry Co., 62 N.L.R.B. 1235; Sam Boorstein, 64 N.L.R.B. 645; Horton's Laundry, 72 N.L.R.B. 1129; Arrow Linen Service, 73 N.L.R.B. 868.

APPENDIX B

United States of America

Before the National Labor Relations Board

Cases Nos. 19-CA-302, 19-CA-303, 19-CA-305, 19-CA-307, 19-CA-308, 19-CB-103, 19-CB-104, 19-CB-106, 19-CB-110, and 19-CB-111

In the Matter of:

HARVEY STOLLER d/b/a RICHLAND LAUNDRY & DRY CLEANERS,

and

LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, affiliated With LAUNDRY WORKERS INTERNATIONAL UNION, AFL, and IRENE HALLENBECK, FLORENCE JONSON, NOLAND TEAL, DONALD DONAHUE, ALMA DONAHUE.

DECISION AND ORDER

On November 6, 1950, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed joint exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the ruling made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondents' exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as noted below:

1. The Board agrees with the Trial Examiner that the Respondent Employer's operations affect commerce within the meaning of Section.....of the Act, and that the Board should exercise jurisdiction in this case. Our decision that it would best effectuate the purposes of the Act to exercise jurisdiction here is based solely on the Respondent Employer's relationship to the national defense effort, arising from his license to do business on a United States reservation devoted to atomic energy. The Board does not rely on the Trial Examiner's finding of fact that the Respondent Employer's business is an essential element in the life of a community which has been established as part of the national defense program. In the Board's opinion, any employer doing business on such an atomic energy reservation, whether or not his business is absolutely essential to the inhabitants of the community, is nonetheless so identified with the Government's national defense program as to warrant the full exercise of the Board's power to assert the jurisdiction conferred on it by the Act.

2. As no exceptions have been filed to the Trial

Examiner's findings of fact on the merits of the case, we adopt them without discussion.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

1. The Respondent Employer, Harvey Stoller, d/b/a Richland Laundry & Dry Cleaners, Richland, Washington, and his agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Recognizing Laundry and Dry Cleaners Union, Local 197, affiliated with Laundry Workers International Union, AFL, or any successor thereto, as the representative of any of his employees for the purpose of dealing with the Respondent Employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said labor organizations shall have been certified by the National Labor Relations Board;

(2) Performing or giving effect to his contract of January 25, 1950, with Laundry and Dry Cleaners Union, Local 197, affiliated with Laundry Workers International Union, AFL, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement or understanding entered into with said labor organization relating to griev-

ances labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said labor organization shall have been certified by the National Labor Relations Board;

(3) Entering into, renewing, or giving effect to any agreement with Laundry and Dry Cleaners Union, Local 197, affiliated with Laundry Workers International Union, AFL, or any other labor organization, which requires its employees to join, or maintain their membership in such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(4) Encouraging membership in Laundry and Dry Cleaners Union, Local 197, affiliated with Laundry Workers International Union, AFL, or in any other labor organization of his employees, by discharging any of his employees or discriminating in any other manner in regard to their hire or tenure of employment, or any terms or conditions of their employment, except to the extent authorized by Section 8 (a) (3) of the Act;

(5) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to engage in or to refrain from engaging in activities guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(1) Withdraw and withhold all recognition from Laundry and Dry Cleaners Union, Local 197, affiliated with Laundry Workers International Union, AFL, as the representative of any of the Respondent Employer's employees for the purpose of dealing with the Respondent Employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(2) Offer to Irene Hallenbeck, Florence Jonson, Noland Teal, Donald Donahue, and Alma Donahue immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(3) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amounts of back pay due and the rights of reinstatement under the terms set out herein.

(4) Post at his office and place of business in Richland, Washington, copies of the notice attached

hereto as Appendix A.[1] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent Employer be posted by him immediately upon receipt thereof, and maintained by him for at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by this Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(5) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent Employer has taken to comply herewith.

2. The Respondent Union, Laundry and Dry Cleaners Union, Local 197, affiliated with Laundry Workers International Union, AFL, its officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Causing, or attempting to cause, Harvey Stoller, d/b/a Richland Laundry & Dry Cleaners, his agents, successors, or assigns, to discharge or otherwise discriminate against employees in violation of Section 8 (a) (3) of the Act.

(2) In any other manner restraining or coercing employees of Harvey Stoller, d/b/a Richland Laundry

[1]In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

& Dry Cleaners, his agents, successors or assigns, in the exercise of their rights to engage in, or to refrain from engaging in, any or all of the concerted activities guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Immediately notify, in writing, Irene Hallenbeck, Florence Jonson, Noland Teal, Donald Donahue, and Alma Donahue, at their last known places of residence, and Harvey Stoller, d/b/a Richland Laundry & Dry Cleaners, Richland, Washington, that it withdraws its objections to the employment of the complainants by the Respondent Employer and that it requests said employer to offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(2) Post in conspicuous places in its business offices, and wherever else notices to its members are customarily posted, copies of the notice attached hereto as Appendix B.[2] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall after being duly signed by an official representative of the Respondent Union, be posted by it im-

[2]See footnote 1.

mediately upon receipt thereof and maintained by it for a period of at least sixty (60) days thereafter. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(3) Mail to the Regional Director for the Nineteenth Region signed copies of the notice attached hereto as Appendix B, for posting, the Respondent Employer willing, at the Richland, Washington, offices and place of business of Harvey Stoller, d/b/a Richland Laundry & Dry Cleaners, in places where notices to its employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being signed as provided in paragraph 2 (b) 2 of this Order, be forthwith returned to said Regional Director for said posting.

(4) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent Union has taken to comply with.

3. Harvey Stoller, d/b/a Richland Laundry & Dry Cleaners, his agents, successors, and assigns, and Laundry and Dry Cleaners Union, Local 197, affiliated with Laundry Workers International Union, AFL, its officers, agents, representatives, successors, and assigns, shall jointly and severally make whole Irene Hallenbeck, Florence Jonson, Noland Teal, Donald Donahue, and Alma Donahue in the manner set forth in the Section of the Intermediate Report entitled "The

Remedy," for any loss of pay they may have suffered by Respondents' discrimination against them.

Signed at Washington, D. C., March 6, 1951.

PAUL M. HERZOG,
Chairman;

JOHN M. HOUSTON,
Member;

JAMES J. REYNOLDS, JR.,
Member;

ABE MURDOCK,
Member;

PAUL L. STYLES,
Member,

[Seal] NATIONAL LABOR RELATIONS BOARD.

APPENDIX C

The Trial Examiner's Findings of Fact entered in this case are as follows:

I. The Business of the Employer

The principal question in this case is whether the Board has jurisdiction. Involved is an aspect of the Board's recently expressed policies on jurisdiction, namely, enterprises which substantially affect the national defense.

The Employer operates a laundry and dry cleaning establishment in Richland, Washington. His business is entirely localized in that area. During the Employer's fiscal year ending August, 1950, he purchased supplies, including soap, cleaning solvents and paper, amounting to approximately $24,000 in value, about one-half of which was shipped to him from points outside the State of Washington. The General Counsel contends that the Board should exercise jurisdiction in this proceeding because of the relation of the Employer's business to the atomic energy program, as discussed below, and it appears that in the absence of this relationship the Board would not assert jurisdiction.

Richland, Washington, was an incorporated municipality prior to World War II. It is now a reservation of the United States Government, along with territory adjacent thereto, and its population has increased substantially to 23,000 persons. During the war, the Government obtained the land and buildings

in Richland, and it became the principal residential area of persons employed in the nearby Hanford Engineering Project which is devoted to the atomic energy program. That project and Richland are operated by General Electric Company, a New York Corporation, as the prime contractor with the Atomic Energy Commission, herein called the Commission. The lease of the land and buildings in Richland is handled by General Electric as rental agent for the Commission.

During the Employer's fiscal year ending August, 1950, and earlier fiscal years, he leased the laundry and dry cleaning establishment, including all equipment and fixtures therein, from the Commission at a guaranteed annual rental of $18,000 and with all profits over six per cent of the Employer's gross income to be paid by him to the Commission. The Employer's current contract, executed at the beginning of the present fiscal year, provides for the lease of the building for a period of five years at a fixed monthly rental of $560, with an option to renew for a like period, and for the sale of the equipment and fixtures to the Employer with payment therefor to be over a maximum period of 10 years.

During the last fiscal year, the Employer's gross income approximated $240,000, of which about $200,000 represented services to persons in Richland and the nearby area. The remaining $40,000 represented services to the prime contractor, subcontractors, the United States Army, and a local competitor, and included:

$19,600 received from General Eelectric for cleaning garments worn by patrolmen and firemen, and $3,600 received from the Army for unspecified laundry services.

The Employer is a sub-contractor of General Electric, the prime contractor in the operation of the Hanford Engineering Project and the community of Richland. The Employer's business is an essential element in the life of a community established and maintained by the United States Government as a part of the national defense program. For these reasons, coupled with the volume of services rendered by the Employer to General Electric and the United States Army, I find that the Employer's operations are a part of the national defense effort. The Respondents contend, with factual support, that the Employer does not have a monopoly of the laundry and dry cleaning business in Richland and that there are competitors in that community and the nearby area. It is not controlling, however, that in the event of a cessation of the Employer's operations because of industrial strife, similar services could be rendered by the competitors.

I find that the Employer is engaged in commerce and that, under applicable decisions of the Board, jurisdiction should be asserted in this proceeding.

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C.A., Secs. 151 et seq. are as follows.

Sec. 151. Findings and declaration of policy.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow

of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 152. Definitions.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in

the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Sec. 156. Same; rules and regulations.

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by sections 1001-1011 of Title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Sec. 160. Prevention of unfair labor practices—Powers of Board generally.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: **Provided**, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

The relevant provisions of the Administrative Procedure Act, 5 U.S.C.A., Secs. 1001 et seq., are as follows:

Sec. 1001(c) Rule and Rule Making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(f) Sanction and Relief.

"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privileges, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

Ses. 1002(a) Rules.

Every agency shall separately state and cur-

rently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Sec. 1002(b) Opinions and Orders.

Every agency shall publish or, in accordance with published rules, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Public Records.

Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found. (June 11, 1946 c. 324, Sec. 3, 60 Stat., 238)

Sec. 1009(e) Scope of (judicial) review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the mean-

ing or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX E

NLRB'S STANDARDS FOR EXERCISE OF JURISDICTION

With the issuance on October 5, 1950, of eight unanimous decisions on the question of the jurisdiction of the Labor Relations Board, the NLRB for the first time in its history announced specific standards to govern it in the exercise of its jurisdiction. These standards were set forth in a special press release. The statement follows with a reference, under each standard, to the case in which the standard was established.

"The National Labor Relations Board today announced the establishment of standards which will govern its exercise of jurisdiction under the Taft-Hartley Act.

"The various 'yardsticks' which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. Pointing out that these standards 'reflect, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues,' the Board said:

" 'The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.

" 'The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained.'

"The Board thereby reiterated its policy of not exercising jurisdiction, despite its power to do so, over business operations so local in character that a labor dispute would be unlikely to 'have a sufficient impact upon interstate commerce to justify an already burdened Federal Board in expending time, energy and public funds.'

"The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution the Board will exercise jurisdiction over:

"1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems) [WBSR, Inc., 26 LRRM 1544].

"2. Public utility and transit systems [local transit Lines, 26 LRRM 1547].

"3. Establishments which operate as integral parts of a multistate enterprise (for example, chain stores, and branch divisions of national or interstate organizations) [Borden Co., 26 LRRM 1546].

"4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year [Stanislaus Implement & Hardware Co., Ltd., 26 LRRM 1548].

"5. Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year [Hollow Tree Lumber Co., 26 LRRM 1543].

"6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year [Federal Dairy, Inc., 26 LRRM 1538]; or

(b) an indirect inflow of material valued at

$1,000,000 a year [Dorn's House of Miracles, Inc., 26 LRRM 1545]; or

(c) a combination inflow or outflow of goods which add up to at least a total of "100% of the amounts required in items 4, 5, 6 (a) and (b) above [Rutledge Paper Products, Inc., 26 LRRM 1544].

"7. Establishments substantially affecting national defense [Westport Moving & Storage Co., 26 LRRM 1581]."

(26 LRRM 50, 51)

In The

Supreme Court of The United States

October Term, 1953

No.....

HARVEY STOLLER, d/b/a RICHLAND LAUNDRY AND DRY CLEANERS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A F L,
Respondent Below,

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

PRELIMINARY STATEMENT

For the sake of brevity, reference is hereby made to the foregoing petition for the ground of this Court's jurisdiction. Also, for the same reason, we refer to the petition for certiorari for the statement of the case, the questions presented and reasons assigned for the granting of the writ. Amendment V to the United States Constitution, the statutes involved and the opinions below appear in the foregoing appendices.

SPECIFICATIONS OF ERROR.

The Petitioner submits that this Court should grant his petition for a writ of certiorari because the Court of Appeals erred in the following important particulars of federal law:

1(a). In permitting the Board to amend the declared purpose of the Act to include the protection of the national defense program.

1(b). In sanctioning the adoption by the Board for the assertion of jurisdiction over labor strife of a "standard" wholly unrelated to the Act.

2. In approving a "standard" of the Board that is arbitrary and capricious for want of equal application to employers whose interstate and intrastate businesses are identical.

3. In holding that the Board could apply its "standard" retroactively to the property loss of Petitioner.

4. In failing to review this case in accordance with applicable statutes of the United States and decisions of this Court by

(a) Ignoring Petitioner's argument that his laundry establishment has no substantial relation to national defense,

(b) Making a determination unsubstantiated by the record and only inferable from the findings of the Trial Examiner adopted by the Board, and

(c) Giving no weight to the Board's un-

controverted finding of fact that Petitioner's business is strictly local.

5. In holding that purchases in the year 1950 amounting to $12,000 do not fall within the **de minimis** rule.

6. In permitting the Board to change its theory of jurisdiction in the Court of Appeals.

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in affirming the amendment of the Act by the Board; jurisdiction cannot be asserted by the Board upon a ground foreign to the Act.

2. The Court of Appeals erred in affirming the assertion of jurisdiction by the Board upon a "standard" arbitrary and capricious for want of equal application to employees whose interstate and intrastate operations are identical.

3. The Court of Appeals' affirmance of the Board's retroactive application of its national defense "standard" illegally deprives Petitioner of his property.

4. The Court of Appeals erred in failing to review this case in accordance with applicable statutes and decisions of this Court.

(a) Petitioner's laundry and dry cleaning plant does not substantially affect national defense.

(b) and (c) The alleged unfair labor practices do not affect interstate commerce within the meaning of the Act.

5. The Court of Appeals erred in holding that Petitioner's interstate purchases, totaling no more than $12,000 per year, do not fall within the **de minimis** rule.

6. The Court of Appeals erred in permitting the Board to alter its theory of jurisdiction.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN AFFIRMING THE AMENDMENT OF THE ACT BY THE BOARD; JURISDICTION CANNOT BE ASSERTED BY THE BOARD UPON A GROUND FOREIGN TO THE ACT.

The decision of the Court of Appeals for the Ninth Circuit is based upon the premise that the Board effectuates the purpose of the Act when it assumes jurisdiction over labor difficulties at a localized industry that substantially affects the national defense program (Appendices A and B). But Congress specifically declared the policy of the Act to be the elimination of obstructions to interstate commerce, and empowered the Board to prevent unfair labor practices causing such obstructions. 28 U.S.C.A., Secs. 151 and 160. As a text writer has said:

> "* * * The ruling purpose of the National Labor Relations Act is to protect interstate commerce * * *. The act is designed to provide methods of preventing or eliminating 'unfair practices' which long and painful experience has shown generally to lead to industrial strife which obstructs or tends to obstruct interstate commerce. * * *"
>
> 31 Am. Jur., Labor, Sec. 136, p. 886

Without conceding that Petitioner's business has any relationship to the defense effort worthy of note, it is here submitted that the Court's premise must fail as it finds no support in the Act itself.

> N.L.R.B. v. Fansteel M. Corp., 306 U.S. 240, 83 L. ed. 627

Had Congress intended the Board to supervise the defense and atomic energy programs, the Act would so read.

Bailey v. Drexel Furniture Co., 259 U.S. 20, 66 L. ed. 817

Brewer v. Blougher, 39 U.S. 178, 10 L. ed. 408

U.S. v. N. E. Rosenblum Truck Lines., 315 U.S. 50, 86 L. ed. 671

However admirable, during this time of world crisis, the Board's purpose in adopting "[e]stablishments substantially affecting national defense" as a "standard" for the exercise of jurisdiction over businesses essentially intrastate, the fact remains that the Board cannot exceed the authority delegated by Congress. The Board has no power to amend the Act by announcing a "standard" which extends the Board's jurisdiction to labor strife at a localized industry with minor interstate purchases, merely because the industry, in the Board's opinion, affects national defense.

See: **Addison v. Holly Hill Fruit Products**, 322 U.S. 607, 88 L. ed. 1488

Iselin v. United States, 270 U. S. 245, 70 L. ed. 566

Manhattan G. E. Co. v. Commissioner of Int. Rev., 297 U.S. 129, 80 L. ed. 528

Koshland v. Helvering, 298 U.S. 441, 80 L. ed. 1268

Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5, 83 L. ed. 1071

F. C. C. v. Pottsville Broadcasting Co., 309 U.S. 134, 84 L. ed. 656

Helvering v. Credit Alliance Corp., 316 U.S. 107, 86 L. ed. 1307

Helvering v. Sabine Transp. Co., 318 U.S. 306, 87 L. ed. 773

To effectuate the policies of the Act, Congress has not granted the Board unlimited discretion.

N.L.R.B. v. Gullett Gin Co., 340 U.S. 361, 95 L. ed. 337

N.L.R.B. v. Fansteel M. Corp., 306 U.S. 240, 83 L. ed. 627

In the Fansteel case, the employer had discharged some employees for engaging in unlawful "sit-down strike" activities. The Board, upon complaint being made, ordered the reinstatement of the employees. The validity of the order was urged in this Court under the Board's authority to take such action as will "effectuate the policies" of the Act. Answering the Board, this Court, speaking through Chief Justice Hughes, said:

> "We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. * * * We are of the opinion that to provide for the reinstatement or

> reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."
>
> **N.L.R.B. v. Fansteel M. Corp.**, 306 U.S. 240, 258, 83 L. ed. 627.

So, too, in the case at bar, the Board was not effectuating the policies of the Act by assuming jurisdiction over a localized industry that, in the Board's view, affects national defense.

The Court of Appeals, by approving legislation by the Board, and by sanctioning a "standard" of jurisdiction not in conformity with the Act, has rendered an important decision on federal law that should be corrected by this Court.

> **Republic Steel Corp. v. N.L.R.B.**, 311 U.S. 7, 85 L. ed. 6

2. THE COURT OF APPEALS ERRED IN AFFIRMING THE ASSERTION OF JURISDICTION BY THE BOARD UPON A "STANDARD" ARBITRARY AND CAPRICIOUS FOR WANT OF EQUAL APPLICATION TO EMPLOYERS WHOSE INTERSTATE AND INTRASTATE OPERATIONS ARE IDENTICAL.

Through the release to the press on October 5, 1950, the Board announced that jurisdiction would not be exercised over business operations local in character. By way of exception thereto, it was further stated that jurisdiction would be assumed over establishments affecting national defense. The Trial Exam-

iner, taking note of the press release, determined Petitioner's laundry and dry cleaning business to be entirely localized to the Richland area, but decided that the Board should assert jurisdiction on account of Petitioner's relationship to the atomic energy program.[19] The Board affirmed, saying that its decision "to exercise jurisdiction here is based solely on the Respondent Employer's [Petitioner's] relationship to the national defense effort, arising from his license to do business on a United States reservation devoted to atomic energy." (Appendix B.)

In the application of the "standard" in question, the Board discriminates between a localized business that is held to affect national defense, and an identical localized business that does not, in the opinion of the Board, affect the defense effort. The ruling intent of this Act is the prevention and elimination of labor practices leading to industrial strife which obstructs interstate commerce. As the "standard" in question cannot reasonably be said to have such an object, it should have been struck down by the Court of Appeals.

> "A statute whose terms create an arbitrary classification is void under the equal protection and due process clauses. Administrative discrimination is but one step removed. It consists of arbitrary classification effected by the exercise of discretion of an administrative agency acting under a valid statute. Just as an attack upon the

[19] The findings of the Trial Examiner as confirmed by the Board leave no doubt that the Board would not exercise jurisdiction over labor difficulties at a business similar to Petitioner's and unrelated to national defense. See also, Capitol Laundry and Dry Cleaners, 91 NLRB 923.

face of a statute is resolved by application of its terms to the facts to see if an arbitrary classification has been made, so a complaint of administrative discrimination depends upon proof of facts which show that an arbitrary classification has been effected through the exercise of administrative discretion. * * *

Classifications are arbitrary which do not have a natural and obvious relation to the purpose of the regulation. * * *" (Emphasis supplied)

Vom Baur, Federal Administrative Law, Vol. 1, 1942 Ed., Sec. 401, pp. 407, 408

In **Yick Wo v. Hopkins**, 118 U.S. 356, 374, 30 L. ed. 220, this Court recognized that there is a denial of equal justice within the prohibition of the Constitution when a fair law (such as the Act) is administered to make unjust and illegal discrimination between persons in similar circumstances.

"* * *The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made."

Asbury Hospital v. Cass County, 326 U.S. 207, 214, 90 L. ed. 6.

A rule setting apart localized businesses with minor interstate purchases from similar businesses on the ground that only the former affect the defense effort, cannot be sustained. As the distinction between the classes does not pertain to the Act, the Court of Appeals should have held the "standard" to be arbitrary and capricious.

See also:

Bradley v. Public Utilities Commission of Ohio, 289 U.S. 92, 77 L. ed. 1053

Dismuke v. United States, 297 U.S. 167, 80 L. ed. 561

I.C.C. v. Union Pac. Ry. Co., 222 U.S. 541, 56 L. ed. 308

I.C.C. v. Illinois C. Ry. Co., 215 U.S. 452, 54 L. ed. 280

In the opinion of the Court of Appeals, the assertion by the Board of jurisdiction upon Petitioner's assumed relationship to national defense was proper as the Board, prior hereto, has exercised jurisdiction over the laundry and dry cleaning industry. (Appendix A.) But what the Board has done in the past can hardly give sanction to the unlawful "standard" so recently adopted, and which the Board applied in this case. Accordingly, this Court is petitioned to grant certiorari and invalidate the discriminatory "standard" as being offensive to the due process clause of the Fifth Amendment.

3. THE COURT OF APPEAL'S AFFIRMANCE OF THE BOARD'S RETROACTIVE APPLICATION OF ITS NATIONAL DEFENSE "STANDARD" ILLEGALLY DEPRIVES PETITIONER OF HIS PROPERTY.

It has long been the rule of the Board not to exercise jurisdiction over laundry and dry cleaning establishments engaged in local business. **J. Arthur Anderson Laundry**, 83 NLRB 1120; **Lebanon Laundry & Dry Cleaners**, 81 NLRB 405; **Progressive Cleaners**

& Dyers, Inc., 81 NLRB 1299; Red Star Industrial Service, 80 NLRB 847; and Capitol Laundry and Dry Cleaners, 91 NLRB 923.[20] In the past the Board has assumed jurisdiction only over those launderers and dry cleaners performing interstate services and operating in commerce as the term is defined by the Act. Arcade Sunshine Company, Inc., 12 NLRB 259; White Swan Company, 19 NLRB 1079; Quality & Service Laundry, 39 NLRB 970; Star Dyers & Cleaners, 53 NLRB 514; H. B. Harwell, 55 NLRB 845; Liberty Laundry Co., 62 NLRB 1235; Sam Boorstein, etc., 64 NLRB 645; Horton's Laundry, 72 NLRB 1129; Arrow Linen Service, 73 NLRB 868; and Indianapolis Cleaners and Launderers Club, 85 NLRB 1198, reversed, 87 NLRB No. 75.

On January 25, 1950, the date Petitioner and the Union signed the closed shop agreement, the Board, was refusing to take jurisdiction of labor disputes at localized laundries, even though the employer's supplies originated in interstate commerce. Red Star Industrial Service, 80 NLRB 847; Capitol Laundry and Dry Cleaners, 91 NLRB 923. The Petitioner and the Union had no cause to believe their contract was not in accordance with law, its validity being recognized by

[20]In the J. Arthur Anderson Laundry case, supplies valued at $1,740 flowed to the employer from other states; Lebanon Laundry dealt with $1,000 worth of incoming out-of-state materials; in Progressive Cleaners & Dyers, Inc., interstate business amounted to $10,000 and interstate purchases amounted to $4,000; Red Star Industrial Service, concerned an employer receiving interstate goods valued at $33,000; and in Capitol Laundry and Dry Cleaners, all supplies were purchased within the state, but a substantial part of them were manufactured elsewhere, and the company had $20,000 worth of interstate sales.

the State of Washington. **Yeager v. International Broth. of Teamsters**, 39 Wn. (2d) 807, 239 P. (2d) 318.

During the months of March and April, 1950, the Employees who refused to join the Union were discharged by the Petitioner. These Employees promptly filed with the Board unfair labor charges against the Petitioner and the Union (R. 3-31). On October 5, 1950, while the charges were pending, the Board formulated the rule that it would take jurisdiction over labor strife at national defense establishments.

The Board took jurisdiction of this case by applying its October 5, 1950, national defense "standard" as of March and April 1950. Having assumed jurisdiction, the Board decided, in part, that the severed Employees should be reimbursed by Petitioner for lost wages (Appendix B).[21] By the Board's arbitrary retroactive application of the "standard" to assume jurisdiction over actions antedating the "standard" by six to nine months, the Petitioner is illegally deprived of his property within the meaning of Amendment V to the Constitution of the United States.

See, **N.L.R.B. v. Prettyman** (C. A. 6), 117 F. (2d) 786

The Act is prospective in its operation.

31 Am. Jur., Labor, Sec. 139, p. 888.

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[21] Employer must offer Employee "immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges" (R. 78), and to "make them whole for any losses of pay they may have suffered because of the discrimination against them." (R. 84).

The power of the Board to deprive Petitioner of his property should not differ. The Courts cannot sustain unreasonable and unfair adminstrative action by a governmental agency.

> Administrative Procedure Act, 5 U.S.C.A. Sec. 1009(e)

The Court of Appeals could see nothing arbitrary in the Board's application of its national defense "standard". The Court held that there is no evidence in the record that Petitioner relied on any non-jurisdiction policy of the Board when the labor practices in question were committed (Appendix A; R. 246-251). The arbitrary actions of the Board, not the Petitioner, run counter to the expressions of the Constitution, the Congress, and this Court. In entering the contract with the Union, the Petitioner would rely on his right to procedural due process. It should be enough that the Board admits jurisdiction would not have been assumed over the alleged unfair labor practices but for the national defense "standard" adopted six months later (R. 45, 75). The retroactive application of the "standard" to Petitioner's property deprivation should not have been countenanced by the Court of Appeals.

4. THE COURT OF APPEALS ERRED IN FAILING TO REVIEW THIS CASE IN ACCORDANCE WITH APPLICABLE STATUTES AND DECISIONS OF THIS COURT.

The Administrative Procedure Act, 5 U.S.C.A. 1001 et seq., 1009(e), reads in part, as follows:

> "[T]he reviewing court shall * * * hold unlawful and set aside agency * * * findings, and conclusions found to be * * * (5) unsupported by substantial evidence * * *. In making the foregoing determinations, the court **shall review the whole record** or such portions thereof as may be cited by any party * * *." (Emphasis supplied.)

The Labor Management Relations Act, 1947, 29 U.S.C.A. 151 et seq., 160(f) provides:

> "[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole, shall * * * be conclusive." (Emphasis supplied.)

In **Universal Camera Corporation v. N.L.R.B.** 340 U.S 474, 95 L. ed. 456, this Court construed these statutes to be Congressional directives to the courts to assume responsibility for keeping the Board within reasonable gounds. At 340 U.S. 490 appears:

> "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The Court of Appeal's decision in this case was not based on the foregoing principles.

(a) Petitioner's laundry and dry cleaning plant does not substantially affect national defense.

The Trial Examiner made a finding of fact that jurisdiction should be asserted because Petitioner's operations substantially affect national defense. The

Board sustained the finding, not so much on the record, but on the ground that any business situate on an atomic energy reservation is an important cog in the defense effort (R. 45-48, 74-75).

Commencing with the hearing before the Trial Examiner, the Petitioner has continuously urged that his laundry and dry cleaning plant plays no greater a part in the defense program than other cleaning establishments in the United States. A review of the record made below will show the soundness of Petitioner's position. The examiner's finding that any one of a dozen competitors could assume Petitioner's business as a moment's notice, and if given half a chance, conclusively determines that national defense is no wise dependent upon the Richland Laundry and Dry Cleaners.

The Court of Appeals erroneously refused to decide whether the record supports the finding that Petitioner's operations substantially affect national defense. Under federal law the finding was subject to review.

> **Universal Camera Corporation v. N.L.R.B., 340 U.S. 474, 95 L. ed. 456**

The admission of the Trial Examiner and the Board that jurisdiction would have been declined but for Petitioner's substantial relationship to the defense effort, points up the importance of the finding the Court of Appeals declined to review. When that review was denied, Petitioner's legal rights were denied

Universal Camera Corporation v. N.L.R.B. 340 U.S. 474, 95 L. ed. 456

N.L.R.B. v. Gullett Gin Co., 340 U.S. 361, 95 L. ed. 337

N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498, 95 L. ed. 479

(b) and (c) The alleged unfair labor practices do not affect interstate commerce within the meaning of the Act.

The Trial Examiner found Petitioner's operations to be entirely localized to the Richland, Washington, area. The Court of Appeals gave no consideration to this finding, but held, in effect, that as Petitioner committed unfair labor practices and annually purchases $12,000 worth of out-of-state supplies, he is subject to the Act. Yet this Court, in **N.L.R.B. v. Jones & Laughlin Steel Corp.,** 301 U.S. 1, 81 L. ed. 893, determined that the Board's jurisdiction inheres upon proof of (a) unfair labor practices (b) interstate commerce, and (c) the former affects, or might well affect, the latter.

All the evidence in the record pertaining to interstate activities by Petitioner is as follows:

"Q. [General Counsel] But may I ask Mr. Stoller, approximately what part of your anual [sic] purchases are shipped to you from outside of the State of Washington?

"A. Well, let's say half.

"Q. Approximately half?

"A. Yes, sir." (R. 111, 112)

The Board's General Counsel did not trouble himself to prove, though the jurisdiction of the Board was in issue, that the 1950 interstate purchases where not made long prior to the labor activities violative of the Act. Nor did he prove the true volume of the imports, as distinguished from the conjectured volume.

Where a federal agency, such as the Board, is authorized to act under federal power except in situations where the power is reserved to the States, state control must be upheld **unless federal power affirmatively appears from the evidence.** Federal authority cannot rest on inference alone.

Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515, 89 L. ed. 1150.

Had the Court of Appeals reviewed the whole record, it would have realized that when the Trial Examiner found Petitioner to be in commerce within the meaning of the Act, he was speaking of Petitioner's business relationship to General Electric. Only by speculation could the Court infer that the Examiner was refering to Petitioner's interstate purchases. (See R. 45-48, and in particular the interstate commerce stipulation, R. 197-199.) The Board's order should have been adjudged upon what the record discloses was the ground for the order.

S.E.C. v. Chenery Corp., 318 U.S. 80, 87 L. ed. 626

Had the entire record been perused, the Court of Appeals would have noted the finding that industrial strife at Petitioner's localized plant would

not affect the laundry and dry cleaning business at Richland (R. 48), and, we submit, could not affect the interstate imports. Instead, the Court looked only to the volume of Petitioner's interstate purchases, entirely disregarded the Board's findings and the remainder of the record, and decided that Petitioner's "unfair labor practices were unfair labor practices affecting commerce * * * [amounting to] approximately $12,000 a year * * *." This was error.

Administrative Procedure Act, 5 U.S.C.A. 1009(e)
Labor Management Relations Act, 1947, 29 U.S.C.A. 160(f)

Universal Camera Corporation v. N.L.R.B., 340 U.S. 474, 95 L. ed. 456

N.L.R.B. v. Fainblatt, 306 U.S. 601, 83 L. ed. 1014

N.L.R.B. v. Pittsburg Steamship Co., 340 U.S. 498, 95 L. ed. 479

5. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S INTERSTATE PURCHASES, TOTALING NO MORE THAN $12,000 PER YEAR, NO NOT FALL WITHIN THE DE MINIMIS RULE.

Petitioner's out-of-state purchases for the fiscal year of 1950 amounted to $12,000. The impact of the labor activities, admittedly unfair if Petitioner is subject to the Act, upon such interstate commerce would be so trivial as to fall within the rule de minimis non curat lex.** The Court of Appeals held

**In Haleston Drug Stores, Inc. v. N.L.R.B. (C.A. 9), 187 F. (2d) 418, the Court of Appeals for the Ninth Circuit agreed with the Board that it would not affectuate the policy of the Act to assume jurisdiction over a local business with interstate imports amounting to $100,000.

to the contrary, thus nullifying the distinction between Federal and State power.

N.L.R.B. v. Fainblatt, 306 U.S. 601, 83 L. ed. 1014, recognizes that the de minimis rule should be applied in the proper case. In N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 81 L. ed. 893, this Court said:

> "* * * The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state. **That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.**" (Emphasis supplied.)
>
> See also, N.L.R.B. v. Shawnee Milling Co., (C.A. 10) 184 F. (2d) 57

The Board, however, has not contented itself with the Jones & Laughlin decision, but has developed its own theory of jurisdiction over local enterprises:

> "The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. * * *
>
> "The Board thereby reiterated its policy of not exercising jurisdiction, despite its power to do do, over business operations so local in character that a labor dispute would be unlikely to have a suf-

ficient impact upon interstate commerce to justify an already burdened Federal Board in expending time, energy, and public funds." (Emphasis supplied)

(N.L.R.B. press release, October 5, 1950, 26 LRRM 50, 51; Appendix D)

Subsequent to the decision of the **Jones & Laughlin** case, the lower courts and the Board, in the construction of the commerce clause, have by judicial and quasi-judicial action gradually whittled away at the distinction between interstate and intrastate activities. This Court is respectfully petitioned to grant certiorari herein, reverse that trend and return to the States the authority to regulate labor activities of businesses primarily local and which, if at all, only remotely affect interstate commerce.

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 306 L. ed. 88

We submit that the decision of the Court of Appeals determining that the alleged unfair labor practices fall within the purview of the Act because Petitioner's localized business annually purchases supplies amounting to $12,000 is in conflict with applicable decisions of this Court and is a matter of great importance to the public.

N.L.R.B. v. Fainblatt, 306 U.S. 1, 83 L. ed. 1014

6. THE COURT OF APPEALS ERRED IN PERMITTING THE BOARD TO ALTER ITS THEORY OF JURISDICTION.

At the hearing upon the complaint charging Peti-

tioner and the Union with violations of the Act, the General Counsel took the position that the Board had jurisdiction through Petitioner's relationship to the atomic energy program (R. 109). The General Counsel extensively examined Petitioner, attempting to prove that the laundry was an integral part of General Electric's operation at Richland, and thereby was engaged in interstate commerce. (R. 95-129.)

The Trial Examiner was of the opinion that the interstate purchases of Petitioner were not being relied upon by the General Counsel to establish the Board jurisdiction (R. 110, 111). The General Counsel did not disagree, merely stating that "it might be helpful if we did have in this record the percentage of his [Petitioner's] purchases that came from out of the state."

At the close of the hearing, the parties stipulated to certain facts going to the Board's power, or lack of power, to take cognizance of the labor dispute.

> "Mr. Bassett [Union's attorney]: Well, I thought before I came to that, you wanted to complete the General Counsel's case by putting in the stipulation that we have reached off the record.
>
> "Mr. Boyd [General Counsel]: In the matter of clarifying **commerce facts.**" (R. 197, emphasis supplied.)

What were these "commerce facts" to which the General Counsel made reference? The interstate purchases of Petitioner upon which the Court of Ap-

peals based its decision? The record answers negatively:

> "Trial Examiner Hunt: All right. From information obtained by counsel, Mr. Stoller, and the Examiner, I believe counsel will stipulate it to be that—their understanding that the General Electric Company operates the Hanford Engineering Project, and the community of Richland as an agent of the Atomic Energy Commission. The project is operated on a cost-plus a fixed fee of one dollar basis.
>
> That is, not upon a profit basis. The rentals of business and residential properties in the community are handled with the General Electric Company acting as the rental agent of the Atomic Energy Commission. The same things were true when the projects were operated by du Pont at a time prior to the operation by General Electric as testified by Mr. Stoller.
>
> The substance of the stipulation as it affects our particular case is that the $18,000 rental which Mr. Stoller paid to General Electric in addition to profits which would accrue to General Electric under their rental agreement were simply turned over by General Electric to the Atomic Energy Commission. And General Electric turns over to the Commission all monies received as rent on other properties which it leases as agent of the Commission. We understand further that the present agreement under which Mr. Stoller operates his business, whereby he has a lease for a longer period of time—I think you testified five years, Mr. Stoller?
>
> "Mr. Stoller: That is right, with an option of five more years.

"Trial Examiner Hunt: And under which he is purchasing the equipment and fixtures within the premises is a lease and a sale agreement negotiated by General Electric as the agent of the Atomic Energy Commission. The form of government for the community of Richland is similar to the City Manager form of government. The manager is appointed by the General Electric Company acting as agent of the Atomic Energy Commission and under rules and regulations prescribed by the Atomic Energy Commission for the government of Richland.

And incidentally the area is patrolled by officers who are employees of General Electric and who are deputized under an arrangement with the County of Benton. That is the substance of our understanding, I believe?

"Mr. Boyd: That is correct.

"Mr. Bassett: We agree that the facts stated are correct.

"Mr. Stoller: Yes, sir." (R. 197-199)

Not until the Board filed an opening brief with the Court of Appeals was jurisdiction, to the knowledge of Petitioner, based upon the affect labor strife would have on the interstate purchases of the Richland Laundry & Dry Cleaners. Petitioner and the Union pointed out to the Court the Board's switch in theories of jurisdiction, but to no avail.

At the hearing Petitioner represented himself and was led to believe by the Trial Examiner that his interstate purchases were considered immaterial by the Board for jurisdictional purposes. (R. 110-

112.) The Trial Examiner's Findings of Fact encompass four printed pages and merely mention the interstate purchases in passing. The Board's Decision and Order confirms the Intermediate Report of the Trial Examiner and no reference is had to Petitioner's minor interstate purchases. The Board's action in changing its theory of jurisdiction in the Court of Appeals from "relationship to General Electric" to "interstate purchases" was wanting in good faith. Upon such happening, the Court of Appeals should, at the least, have remanded the matter for the purpose of taking further testimony on the new issue.

By resting its determination of jurisdiction upon Petitioner's interstate purchases, a ground not asserted before the Board, the Court of Appeals so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

See: **McGrath v. Manufacturers Trust Co.**, 338 U.S. 241, 94 L. ed. 31

United States v. Hoffman, 335 U.S. 77, 92 L. ed. 1830

Virginian R. Co. v. Mullens, 271 U.S. 220, L. ed. 915

Peck v. Heurich, 167 U.S. 624, 42 L. ed. 302

CONCLUSION

The Court of Appeals has resolved important questions of federal law to conflict with applicable decisions of this Court and enactments of the Congress. Without prolonging this brief, it is submitted that this Court should grant certiorari to review the decision of the Court of Appeals, especially the Court's sanction of the arbitrary national defense "standard" and its retroactive application by the Board in this case.

> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider * * * whether, even although the order be in form with the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * *"
>
> I.C.C. v. Illinois C. Ry. Co., 215 U.S. 452, 54 L. ed. 280, 288.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1953

Docket No.....

HARVEY STOLLER, d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, and LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION OF LAUNDRY AND DRY CLEANERS CLEANERS UNION,LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1953

HARVEY STOLLER, d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, and LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., *Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Docket No.....

PETITION OF LAUNDRY AND DRY CLEANERS CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Come now the INTERNATIONAL LAUNDRY WORKERS UNION, A.F.L., and LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH THE INTERNATIONAL LAUNDRY WORKERS UNION, A.F.L., and respectfully petition this Court for a Writ of Certiorari to issue, to review a decision of the United States Court of Appeals for the Ninth Circuit, rendered September 23, 1953.

OPINION

Petition for Rehearing was denied October 21, 1953. The Court's Opinion is reported at 207 F.(2d) 305, and is attached to the companion Petition for Certiorari presented by HARVEY STOLLER d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, as Appendix "A," which by reference thereto we adopt herein.

The Circuit Court affirmed a decision and order of the National Labor Relations Board, hereinafter referred to as "Board," dated March 6, 1951. The decision of the Board, reported in 93 N.L.R.B. 680, is attached as Appendix "B" to the companion petition of HARVEY STOLLER, d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, filed contemporaneously herewith, which by reference thereto we hereby adopt.

JURISDICTION

The opinion of the United States Court of Appeals, for the Ninth Circuit, was entered and filed September 23, 1953. The petition for rehearing was denied October 21, 1953. The decree enforcing the order of the National Labor Relations Board was entered by the United States Court of Appeals, for the Ninth Circuit, November 9, 1953. Jurisdiction of this Court is invoked under the statutes of the United States, notably 28 U.S.C. 1254 (1) and 29 U.S.C. 160 (f).

QUESTION PRESENTED

The problem here presented may be compactly stated first by paraphrasing it as submitted to the Circuit Court below, and then by recasting in the form in which we feel it serves to raise a substantial federal question of great concern to both the states and the nation, important enough to warrant and require consideration by this Court. In abbreviated form we posed the problems to the Circuit Court below substantially as follows:

> (1) Does the Commerce Clause of the Federal Constitution authorize the Board under the National Labor Relations Act to exercise jurisdiction over an admittedly local intrastate laundry in and by reason of its location within a defense project?
>
> (2) If the Board asserts jurisdiction over such a business, is it not as a condition prerequisite required officially to publish a promulgation of such policy in accordance with the Administrative Procedure Act before asserting it for the first time and applying it retroactively?
>
> (3) Where such a policy had theretofore been non-existent, may the Board without notice either to the employer or to the Union involved, impose it in such a way as to exact retroactive penalties and sanctions?

In the light of the statutes quoted in Appendix "A," it should have been held, and we urge contrary to the court below, must be held:

> (i) That the operation of the local laundry at Richland, involved in this case, does not involve an *"obstruction * * * to the free flow of commerce"* (29 U.S.C., Sec. 151).

(ii) That operation of this local laundry does not constitute *"commerce"* * * * *"transportation"* * * * *"among the several states"* (29 U.S.C. 152 (6)).

(iii) Nor does the operation of this local community laundry *"affect commerce"* in the sense that it is *"in commerce"* or that it *"burdens commerce"* or that it in any appreciable way *"tends to lead to a labor dispute, burden or affect commerce or the free flow of commerce"* (29 U.S.C. 152 (7)).

(iv) That while the statute affords the Board authority to *"make rules and regulations"* it does not under the guise thereof authorize the Board to reach out and seize a purely local and community business and brand or label it *"commerce,"* nor may the rule-making power be substituted for the Board's enumerated statutory powers merely because a local laundry is located upon a national defense project.

(v) That if, in fact, the community laundry here involved is a local operation, no unfair labor practice *"affecting commerce"* has been committed solely by reason of the existence of the operation upon and within a national defense project (29 U.S.C. 160(a)).

Amplifying these questions without altering their sense or substance thus presented to the Court below, we undertake, for purposes of this petition, to formulate them in order to pin-point the far-reaching importance of the issues involved:

(a) May the Board, of its own motion, without express legislative sanction, extend its jurisdiction so as to include a purely local operation—a community laundry here—without notice or publication thereof, merely by adopting a new criterion

defined as "establishment substantially affecting commerce"?

(b) In any event, may the Board so exercise its power as to penalize an employer and a union *retroactively* under a contract which, when executed, was valid under the state law? Is not such an attempt a violation of the concept of due process?

(c) Must it not, in any event, comply with the Administrative Procedure Act requiring new promulgations of regulations and policy to be published in the Federal Register?

(d) Is a community laundry, admittedly otherwise local and intrastate, converted *ipso facto* into interstate commerce, merely by virtue of its location within a national defense project?

(e) Where the Board rejects a finding that the laundry is engaged in interstate commerce (other than by reason of its location within a national defense project) may the Circuit Court below base its decision upon a finding of its own making, resting jurisdiction solely upon the adventitious and ever-shifting year-to-year circumstance that the local laundry purchased a minimal quantity of soap from without the state? Is it not error for the Circuit Court to make a finding which the Board itself disavows, and to find interstate commerce where the Board itself finds that the local operation is not engaged in "commerce" *qua* "commerce"? Does not the factitious purchase of soap in some given year amount to a consideration falling squarely within the spirit of the rule of *de minimis*? Is not the purchase of soap, one year perhaps *inter*, another year *intra*, too peripatetic a

premise—too ephemeral—upon which to find interstate commerce?[a1]

STATUTES

The subject matter of the controversy herein involves (1) the Fifth Amendment to the Constitution of the United States, (2) the National Labor Relations Act, notably Sections 151, 152, 156 and 160, (3) the Administrative Procedure Act, 5 U.S.C., Sections 1001 *et seq.*, particularly Sections 1001(c)(f), 1002(a)(b)(c), and 1009(e). Applicable statutes particularly pertinent appear herein as Appendix "A."

STATEMENT OF MATTER INVOLVED

These petitioners, joining as they do in the companion petition of the employer, Harvey Stoller, filed concurrently herewith, seeing no sufficient reason to warrant repeating here facts so excellently stated in

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[a1] We are conscious of the fact that *certiorari* does not issue merely to review error of law on the part of the court below but the fact that grievous prejudice results to these petitioners and may, unless checked by this court, operate a serious prejudice to many others similarly situated can scarcely be better illustrated than by referring to the recent decision of the Ninth Circuit, that of *N.L.R.B. v. Pappas & Co.* (C.A. 9) 203 F.(2d) 569, decided April 22, 1953. There, the Circuit held that an objection not urged before the Board could not be considered by the court, and it very soundly predicated its holding upon the express language to that effect contained in 29 U.S.C. 160(c). Its deviation from the Board's finding in this case is equally as prejudicial as was the attempt to do so which it condemned in the *Pappas* case, and that prejudice cannot be cured merely because the court's departure in the instant case was of its own motion.

employer's co-petition, both under the topic of "Statement of the Matter Involved" (Pages 3-6, Stoller petition) and under the topic of "Facts" (Pages 6-12, Stoller petition), and in the interest of brevity, hereby adopt the facts stated therein by reference thereto.

These petitioners merely desire, supplementary thereto, to emphasize that the petitioning employer entered into a contract with petitioning union on January 25, 1950, requiring membership in the union as a condition of employment. This contract was executed under and conformable to the laws of the State of Washington.[1] Some months thereafter—precisely as of April 18, 1950—the Board undertook for the first time to assert jurisdiction over the laundry operation and filed charges against the employer and the union by reason of the dismissal of certain employees for failure to continue their membership in the union pursuant to the contract. (We vigorously challenged this summary action before the Circuit Court as violative of the protective sanctions vouchsafed under the Administrative Procedure Act (See *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 95 L.Ed. 456). We renew the challenge before this Court but do not further notice it herein since it has been so excellently urged and argued in the brief of co-petitioner Stoller (Pages 62-67, Stoller brief), which argument we adopt).

The next fact in the table of events affecting this controversy is that the Board issued in published form for the first time (but not through publication in the

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[1] *Yeager v. International Brotherhood of Teamsters*, 39 Wn.(2d) 807, 239 P.(2d) 318.

Federal Register) its new "standard" "for exercising jurisdiction" *"over establishments substantially affecting national defense"* on October 5, 1950—some eight months after it had unilaterally and *ex parte,* so to speak, asserted jurisdiction over the instant employer by means of the charges filed in the prior month of April.

A fact next in order of importance is the finding by the Board, as a result of the hearing on these charges, both by its intermediate trial examiner and the Board in its decision of March 6, 1951, that its jurisdiction depended not upon the fact that the laundry here in question was, *de ipso,* an operation engaged in commerce under the Act, but rather upon the fact that the location and operation of the laundry, though exclusively within the state of Washington, bore such a "relationship to the national defense effort" as to "warrant full exercise of the Board's power." (R.I., pages 42 to 70; 74 to 87, Appendix "B," Stoller petition).

Another fact which not only places this laundry operation in its proper contextual background but which goes a long way toward illustrating the irreparable prejudice and discrimination which the Board's decision visits upon petitioners is to be found in the evidence, unquestioned and admitted in the record, that petitioning laundry is by no means a monopoly in the Richland area. On the contrary, it is in competition with at least ten other local laundry businesses (R.I. 64 *et seq.*).

SPECIFICATIONS OF ERROR

1. Board action here exceeds congressional and constitutional grant of jurisdiction.

2. Board order void: failure to comply with Administrative Procedure Act.

3. Board action here is retroactive assertion of new policy imposing penalties and sanctions constituting denial of due process and property rights to these petitioners.

REASONS FOR GRANTING WRIT

The U. S. Court of Appeals for the Ninth Circuit, in its decision below, decided an important question arising not only under the Fifth and Fourteenth Amendments to the Constitution of the United States and under the Commerce Clause of the Constitution, but likewise, under specific statutes of Congress, enumerating powers of the National Labor Relations Board under the Commerce Clause. By its decision it sustained a new and hitherto unprecedented exercise by the Board of jurisdiction over an intrastate laundry. The intrastate laundry, at the time that the Board undertook to subject it to federal action and control, was operating in traditional conformity with the laws of the State of Washington. The Circuit Court decision, as we conceive it, was thoroughly untenable for the reason that if allowed to stand, its *ratio decidendi* would be so universal and sweeping in scope as to permit, with little or no exception, of the absorption of all purely local and intrastate businesses by federal agencies asserting power and jurisdiction under the

Commerce Clause. The premises upon which the Circuit Court's decision rested a finding of interstate commerce are readily present and discernible in practically all local intrastate operations. The line of distinction between local and interstate, so carefully preserved under our constitutional system, would be wiped out, and citizens of the individual states would, to an incalculable extent, be deprived of cherished constitutional sanctions against federal encroachment. This is, we submit, a real, substantial and by no means a phantom problem. It is one of such far-reaching importance as to be worthy, we earnestly feel, of studied consideration and solution by this Court.[2]

The decision of U. S. Court of Appeals for the Ninth Circuit constituted a marked departure from and a prejudicial erosion of hitherto settled constitutional principles. The decision undertook, to the serious prejudice of these petitioners and ultimately, if allowed to stand, to the prejudice of an infinitely innumerable class of citizens of the various states engaged in local businesses, to vest the Board, as a national agency, with control over a business heretofore admittedly purely intrastate in character. This Court, under similar circumstances, has heretofore seen fit to intervene.[3] In the face of facts

[2] We do not file a separate brief in support of our petition for writ. The matter has been satisfactorily argued in the supporting brief of our co-petitioner, *Stoller d/b/a Richland Laundry and Dry Cleaners*, filed contemporaneously herewith, and we confine ourselves to a statement of the reasons supporting our petition, reserving a brief to be submitted in the event this Court should deem it proper to issue a writ.

[3] Cf. *Meyer v. Bethlehem Corp.*, 303 U.S. 41.

and circumstances presented in the record in the instant case this Court, in a long line of decisions, has decided the controversy in the case entirely contrary to the principle of the decision of the Circuit Court below. Among such decisions are the following:

Addison v. Holly Hill Fruit Products, 322 U.S. 607, 88 L.Ed. 1488;

Iselin v. United States, 270 U.S. 245, 70 L.Ed. 566;

Manhattan G. E. Co. v. Commissioner of Int. Rev., 297 U.S. 129, 80 L.Ed. 528;

Koshland v. Helvering, 298 U.S. 441, 80 L.Ed. 1268;

Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5, 83 L.Ed. 1071;

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 84 L.Ed. 656;

Halvering v. Credit Alliance Corp., 316 U.S. 107, 86 L.Ed. 307;

Halvering v. Sabine Transportation Co., 318 U.S. 306, 87 L.Ed. 773;

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L.Ed. 893;

N.L.R.B. v. Atkinson & Co. (C.A. 9) 195 F.(2d) 141.

We are impelled to petition for a Writ in the instant case because of the obvious sweeping, comprehensive and all-embracing reach of power here asserted by the Board. If national defense were to be the criterion for the interposition of the Board into the

operation of local businesses, then it goes without saying that it would have a weapon with which to step into practically any local community in every state in the Union. In these days and times (and who can say for how long a duration in the future?) national defense is all but universal throughout the land. No employment, no matter how minor or how far removed from the marts of trade, would be free from the Board's reach. If it involves a laundry today, why not barber shops, moving picture theatres, beauty salons and other purely household businesses tomorrow? Unless afforded judicial and constitutional protection, federal agency action, with ever increasing tempo, *could* (and why are we not justified in saying *would*?) wipe out in substantial measure the very fabric of the traditional distinction between state and federal jurisdictions.

This is nonetheless true if the ground of jurisdiction be shifted from national defense—as the Board sought to base it—to a minimal purchase of supplies, such as soap here, on the part of the local industry beyond state lines. Where is the butcher, the baker, the candlestick maker, the grocer or in fact any small local business man today, who does not buy equipment or supplies beyond state lines? Does that minimal and purely incidental circumstance mean that intrastate business thereby vanishes and evaporates and that the long reach of a federal agency steps in?[4]

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[4] We have here no concern over dealers furnishing goods to manufacturers of products designed for use in commerce. We recognize a long line of decisions bringing such products within the periphery of the commerce clause and notably so where the Fair Labor Standards Act is involved but even in such cases

Such is the problem which the decision poses to this Court. Petitioners therefore respectfully submit that a writ of *certiorari* should issue to the U. S. Court of Appeals for the Ninth Circuit in order to determine whether substantial rights granted by federal law for the protection of these petitioners and others similarly situated throughout the various states have not been infringed and denied.

The problem herein is not one limited to the peti-

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the courts have been alert to exempt establishments of a retail trade character where they are engaged in selling, not products, but goods and services. Cf. *Durkin v. Mercer Water Co.* (D.C. Pa.) 112 F.Supp. 656.

Nor need we notice cases such as that decided recently by this court, *Howell Chevrolet Co. v. N.L.R.B.*, December 14, 1953, ... U.S. ..... (Adv. Sheet not yet printed), C.C.H. Par. 68,019, aff'g. C.A. 9, 204 F.(2d) 79. Entirely absent in that and related cases are the factors which go to make up the major problem in our case. In the *Howell* case there were obviously sufficient volume and substantiality of movement of automobile products as to constitute an integral link in the chain of a national distribution system. In our instant case we have nothing more than services, entirely local, which the Board seeks to bring within the ambit of the Commerce Clause by virtue of a *locale* within a defense project, but which the Circuit Court, deviating from the Board, treats within the coverage of the Commerce Clause by virtue of minimal purchases of soap outside the state. There is likewise comprehended within the issues of the instant case the question whether the Board, by its own fiat, may apply retroactive sanctions and whether it may do so in contravention of the mandates of the Administrative Procedure Act. Whether a failure to adhere to the Administrative Procedure Act is error, is a question affecting many parties and industries widespread throughout the country and by no means limited to the circumscription of these parties.

tioners who are parties hereto. It involves a pattern which the National Labor Relations Board, as a matter of first impression, seeks to lay down, which in principle affects an incalculable and innumerable class of small local businesses in every local community within the Union. It undertakes, as we earnestly urge, to extend to the National Labor Relations Board an unwarranted power of federal administrative action over local and community affairs. The impact of its decision is of such serious prejudice to petitioners and those similarly situated as to justify, we feel, this petition for review.[5] It would, if sanctioned, upset many years of settled recognition of a hitherto undoubted distinction between state and federal action under the Commerce Clause.

History of the federal system since 1879 is a history of expansion. It has been through the medium of implementing commerce and transportation within the reach of the Commerce Clause that the federal system has so largely expanded, and in expanding has done so at the expense of state and local jurisdiction. Judicial construction too has played an important role in the expansion movement. Federal courts, even in the absence of express legislation, have been, we may say, prodigious in amplifying federal power and thus diminishing or obscuring the exercise of such power at the state or local level. They have done so not only by liberally construing the enumerated powers defined in the Constitution but conspicuously also by invoking the doc-

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[5] Cf. *U. S. v. Ruzicka*, 329 U.S. 287; *Rathensies v. Electric Battery Co.*, 399 U.S. 296; *Patterson v. Lamb*, 329 U.S. 539.

trine of implied powers so as to include within the Commerce Clause many subjects of commerce theretofore reserved to the states; thus, little by little, federal power has superseded state jurisdiction to a very large extent, even at the expense of the constitutional concept that plenary power resides in the states and that the federal government is merely one of numerated or delegated power. Particularly since the 1930's has it been true that it is necessary only to evoke the image of commerce or transportation—great or small—in order to sustain practically any exercise of federal power.

Notwithstanding this trend toward expansion of federal control over commerce, we undertake to submit that there still exists a line of demarcation between state and federal power. Not everything that has to do with commerce or transportation falls within the federal domain. There is still a respect on the part of the federal government, and distinctly so upon the part of federal courts, for that which is peculiarly local and domestic. That which functions substantially and primarily within state boundaries lies, we submit, outside the reach of federal power. The contours which mark the boundary between state and federal authority have never been obliterated, nor do the courts ignore them. Were it otherwise, the very framework upon which our system of government rests would be undermined.

It is because petitioners feel that a business—call it commerce if you will—purely local and domestic in its essence remains under local or state control and outside the scope of federal authority that this petition is respectfully lodged with this Court. Petitioners are earnestly convinced that to sustain the position of the

Court of Appeals for the Ninth Circuit, affirming in turn the National Labor Relations Board, would go far indeed in the direction of blotting out all distinction between federal and state jurisdictional lines. It would sanction a new and heretofore never-exercised power. It would establish an authority on the part of the federal government to invade every local community and to regulate or control any and every local business. This Court has never authorized the federal government, under the guise of the Commerce Clause, to reach into the states and regulate or control business whose functions are substantially local. If there be a line of distinction between state and federal exercise of power over commerce, and if that line is still to be preserved, then we respectfully submit a review of this decision is vital and essential.

In urging our position upon this Court we do not for a moment lose sight of the fact that changing economic conditions and changing facts relevant to commerce and transportation have imposed upon the courts the task and obligation of adjusting judicial construction wherever necessary within the framework of the Constitution to meet such changes. We admit the force of this consideration, but in doing so we are, we believe, on firm ground in urging that judicial construction, justified though it may be within its proper limitations, cannot—should not—wipe out the essential fabric of our constitutional system. Conditions may change, and do change; both facts and conditions may from time to time shift, but such changing or shifting is, at most, contingent. Despite these contingent shiftings and changes, the framework of our con-

stitutional division between state and federal jurisdiction must remain permanent and unimpaired. That which is *contingent* may disappear; but the *substance* will still remain. The peculiar genius of our system has been its capacity to function through the medium of the exercise, side by side, of state and federal power without encroachment by one upon the domain of the other. It has succeeded in practice in carrying out the abstract Aristotelian concept of "The One" and "The Many" functioning together as a unit. That unity cannot be more explicitly defined than in the national motto which has so deeply woven itself into our economic life: "*e pluribus unum.*"

We undertake here to raise no question whatever with respect to the supremacy of the federal government in the field of interstate commerce. Where interstate commerce is in substance and reality actually involved, federal supremacy is conceded. Where the fact of interstate commerce exists, federal supremacy excludes all conflict therewith by any form of state action.

But we are here concerned with the exercise for the first time by federal authority of a regulatory power over a business traditionally, substantially and actually local in function. The business here involved is that of a local laundry. It serves a particular local community. It is true that the community itself is located within an area operating under the authority of the Atomic Energy Commission but it remains, nonetheless, a fact that the laundry in question falls outside the scope or definition of interstate commerce. It is no different in any respect whatsoever than the local restau-

rant, the local barber shop, the local beauty parlor, the local butcher, the local grocery store next door to or across the street from it.

It is the essence of our position that the National Labor Relations Board can exercise no power over the employees of this laundry shop unless the laundry is engaged in interstate commerce. The significant fact in this case is that the Board, in its decision, disavowed any claim that the operation of this local laundry involved interstate commerce. The Board reached its decision squarely and exclusively upon the ground that the laundry, though local and outside the realm of interstate commerce, nevertheless fell within its reach because it was located upon a governmental defense project or reservation. It was upon this holding that we assigned error in our petition for review by the Circuit Court. The Circuit Court hazarded no expression or opinion whatsoever upon this subject though it constituted the entire gravamen of the appeal but departed entirely from the Board's decision and by a strained inference undertook to adjudge the laundry to be engaged in interstate commerce.

If this holding should stand, every local business in every local community of every state in the Union would fall into the control of federal government and its various agencies. State jurisdiction and control would be, substantially speaking, a thing of the past. The 48 proud sovereign states of the Union would become in fact nothing more than mere provinces—mere administrative *"marches"*—under an all embracive federal imperium. Some, perhaps, would wish such a consum-

mation. It goes without saying that many, indeed most, would deplore it. This much is true: If we are to be transformed from a nation of 48 states, coordinate in dignity with the federal power, into one central federalized government in which the states are but a mere administrative agency or prefecture authorized only to carry out the federal command, then let such transformation and transmutation come, not by the alchemy of judicial construction but by frank open and avowed legislative processes, and may we venture to submit that there remain innumerable American citizens who confidently hope and believe that such a transformation may never occur.

CONCLUSION

The questions and problem here involved transcend the mere correction of error below. Petitioners here seek to vindicate vital and important national rights which have and should have, as we feel, the same force and vigor in every community throughout the land as petitioners claim for themselves in the operation of their local laundry in Richland, Washington. Petitioners have, we submit, the right to operate their local laundry in conformity with the law which applies to their competitors and to others engaged in local operations, be they groceries, restaurants, theatres or other local business establishments. The power asserted by the Board in the instant case is not only novel but it is unprecedented. The problem inherent therein is of tremendous national and widespread importance. The decision below conflicts with fundamental principles and

with traditional decisions heretofore announced by this Court. The question is of substantial public interest and is particularly current today. It is one that has never heretofore been decided by this Court. It is respectfully submitted that this petition should be granted.

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APPENDIX "A"

Statutes or excerpts therefrom, so far as material in discussion throughout the petition, are quoted as follows:

1. National Labor Relations Act:

(1) 29 U.S.C., 151:

"FINDINGS AND POLICIES— * * * It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

(2) 29 U.S.C., 152 (6):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

(3) 29 U.S.C., 152 (7):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or

the free flow of commerce, or having led or tending to lead to a labor dispute led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

2. Administrative Procedure Act:

(1) 5 U.S.C. 1001 (c):

"RULE AND RULE MAKING—'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy or to describe the organization procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

(2) 5 U.S.C. 1001 (f):

"SANCTION AND RELIEF—"Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any

claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person."

(3) 5 U.S.C. 1002 (a):

"RULES—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization, including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

(4) 5 U.S.C. 1002 (b):

"OPINIONS AND ORDERS — Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules."

(5) 5 U.S.C. 1002 (c):

"PUBLIC RECORDS—Save as otherwise required by statute, matters of official record shall in ac-

cordance with published rule be made available to persons properly and directly concerned, except information held confidential for good cause found."

(6) 5 U.S.C. 1009 (e):

"Scope of Review—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 (Sections 1006, 1007 of this title) or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error."

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National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):

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In the Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 541, 542

HARVEY STOLLER D/B/A RICHLAND LAUNDRY AND DRY CLEANERS, AND LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, AFL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 246–251) is reported at 207 F. 2d 305. The Board's decision and order (R. 74–86) is reported at 93 N. L. R. B. 680.

JURISDICTION

The judgment of the court below (R. 252–258) was entered on November 9, 1953. The petitions for writs of certiorari were filed on January 18,

1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the unfair labor practices committed by petitioners affected commerce within the meaning of the National Labor Relations Act.

2. Whether the Board's assertion of jurisdiction in the instant case constitutes a valid exercise of its statutory authority.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in Appendix D to petitioner Stoller's petition (No. 541) at pp. 41–43.

STATEMENT

A. *The Board's findings and conclusions.*—The Board found (R. 75, 54–56) that petitioner Harvey Stoller, doing business as the Richland Laundry and Dry Cleaners (hereafter called Stoller), at the request of petitioner Laundry and Dry Cleaners Union, Local 197 (hereafter called the Union), discharged five employees in violation of Section 8 (a) (3) of the Act, contributed support and assistance to the Union in violation of Section 8 (a) (2), and by these and other acts interfered with and restrained his employees in the exercise of their rights under the Act, in viola-

tion of Section 8 (a) (1). The Board further found (R. 75, 60–61) that the Union violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act by causing Stoller to discharge employees discriminatorily in violation of the Act. The Board accordingly entered its order remedying these unfair labor practices (R. 76–82).

Petitioners do not challenge the Board's unfair labor practice findings, but contend that the Board erred in asserting jurisdiction in this case. The facts relating to Stoller's operations may be summarized as follows:

Petitioner Stoller operates a laundry and dry-cleaning establishment employing 85 employees in Richland, Washington (R. 121). During the fiscal year ending in August 1950, he purchased supplies, including soap, cleaning solvents, and paper, amounting in value to approximately $24,000, of which about one-half was shipped to him from points outside the State of Washington. His gross income during this period amounted to approximately $241,000, of which approximately $200,000 represented service to residents of Richland and nearby areas; the remaining $41,000 represented services to the General Electric Company ($19,600 for cleaning garments worn by patrolmen and firemen), to the United States Army ($3,600), to a local hotel and restaurant operated under leases from General Electric ($14,000), and to a local competitor ($4,500). (R. 46–47; 107–110, 112–113, 115–116, 119–121.)

The town of Richland was an incorporated municipality before World War II. During the War the United States Government purchased all its buildings and land, together with adjacent land, and established the reservation upon which it built, adjacent to Richland, the Hanford Engineering Project, devoted to the development of atomic energy. Richland became the chief residential area for persons working in the project, and now has a population of approximately 23,000 people. (R. 46; 95–96, 140–141.)

Both the Project and the town of Richland are operated on behalf of the Government by General Electric Company under contract with the Atomic Energy Commission (R. 46; 98). The lease of the land and buildings in Richland is handled by General Electric as rental agent for the Commission (R. 46; 101–102). Petitioner Stoller leases the laundry and dry cleaning establishment, including all equipment and fixtures, from General Electric (R. 46; 104).

Upon the foregoing facts, the Board concluded that Stoller's operations affect commerce within the meaning of Section 2 (6) and (7) of the Act. The Board further concluded that Stoller's "relationship to the national defense effort, arising from his license to do business on a United States reservation devoted to atomic energy", "warrant[ed] the full exercise of the Board's power to assert the jurisdiction conferred on it by the Act." (R. 75.)

B. *The decision of the court below.*—The court below, enforcing the Board's order in full, concluded (R. 248–250) that Stoller's interstate purchases of materials and supplies sufficed to support the Board's assertion of jurisdiction over Stoller. The court rejected petitioners' argument that, even if the Act gave the Board jurisdiction in this case, such jurisdiction should have been declined by the Board as a matter of discretion.

ARGUMENT

The petitions for certiorari, which rest in large part upon a failure to distinguish between the Board's jurisdiction conferred by the Act and the Board's discretionary power to decline to assert some of the jurisdiction Congress gave it, present no question warranting review by this Court.

1. The Board's statutory jurisdiction over petitioner Stoller, and consequently over the Union, cannot be seriously challenged. As already stated, Stoller in the conduct of his business purchases annually approximately $12,000 worth of supplies and materials directly from points outside the State of Washington. The volume of interstate commerce thus involved is clearly sufficient to sustain the Board's jurisdiction. Cf. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 699. A cessation of Stoller's operations as a result of industrial strife attributable to unfair labor practices, affecting as it would the inter-

state movement of these supplies and materials in their normal channels, would have, as the court below observed (R. 249), more than a *de minimis* effect on commerce. It follows, contrary to petitioners' contentions (S. Pet. 63–70; U. Pet. 9–19),[1] that the Board had power under the Act to remedy petitioners' unfair labor practices. *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U. S. 675, 683–684; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606–607; *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647.

Petitioners' claim (S. Pet. 54–60; U. Pet. 11–12) that the Board, with the approval of the court below, predicated its statutory jurisdiction in the instant case solely upon what they characterize as "a ground foreign to the Act"—*i. e.*, the circumstance that Stoller's business operations were identified with the national defense program—misconceives the decisions of both the Board and the court below. As is evident from the text of the two decisions (R. 75, 248–249), the Board's holding that the Act gave it jurisdiction in the instant case was based upon the finding that "[Stoller's] operations affect commerce within the meaning of the Act." It was only in making its discretionary determination as to whether the instant case warranted the exercise

[1] The symbols "S. Pet." and "U. Pet." refer, respectively, to Stoller's petition (No. 541) and the Union's petition (No. 542).

of its undoubted statutory jurisdiction that the Board, applying the administrative standards it has evolved in this area,[4] gave decisive weight to the circumstance that Stoller's operations are identified with the Government's national defense effort.

But this does not mean, as petitioners assert, that the Board has undertaken to extend its statutory authority and to remedy unfair labor practices because they affect the national defense effort rather than, as the Act prescribes, because they affect commerce. The identification of the particular business enterprise with the national defense effort is merely a factor which the Board in the exercise of its administrative discretion takes into consideration in determining whether it would effectuate the policies of the Act to exercise its statutory jurisdiction over an enterprise whose operations otherwise bring it within the coverage of the Act. Given its clear statutory authority, the Board's discretionary determination to exert its power in cases of the type presented here supplies no basis for petitioners' attack. Cf. *National Labor Relations Board* v.

[4] These standards were explicated in a series of Board decisions which have since been published in the official reports of the Board's decisions and orders. The cases are cited and summarized in National Labor Relations Board, *Sixteenth Annual Report* (1951), pp. 15–16, 23–34. The Administrative Procedure Act, contrary to petitioners' assertion (S. Pet. 15; U. Pet. 5), does not require publication in the Federal Register of the Board's opinions or orders in the adjudication of cases. See Sec. 3 (b) of the Administrative Procedure Act, 5 U. S. C. 1002 (b).

Denver Bldg. Council, 341 U. S. 675, 684. As the court below has emphasized in prior cases, "providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383; *Galeston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421, certiorari denied, 342 U. S. 815. *Accord: National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852, 854–855 (C. A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C. A. 5); *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36 (C. A. 2), affirmed, 341 U. S. 694.[8]

[8] Related to their failure to distinguish between the Board's jurisdiction under the statute and the Board's discretionary power to withhold the exercise of that jurisdiction in appropriate cases is petitioners' mistaken contention that the Board changed the theory of its jurisdiction in the court below. The assertion is (S. Pet. 70–74; U. Pet. 12) that the Board relied upon Stoller's interstate purchases as the basis for its jurisdiction for the first time in the court below, but had grounded its decision solely upon Stoller's relationship to the national defense program. However, the complaint alleged that Stoller's operations affected commerce by reason of the fact that Stoller purchased substantial quantities of supplies in interstate commerce (R. 33). At the hearing a representative of the Board's General Counsel declared that the Board's jurisdiction was invoked, in part, on the basis of Stoller's substantial purchases of supplies from outside the State of Washington (R. 110–111). The trial examiner found that Stoller was engaged in commerce within the meaning of the Act (R. 48) and the Board expressly "agree[d] with the

It should be noted in this connection that the Board in its more recent decisions has indicated that it would not continue to exercise its statutory jurisdiction over enterprises similar to petitioner Stoller's. *Ideal Laundry & Dry Cleaners*, 107 N. L. R. B. No. 186, 33 L. R. R. M. 1271; *Taichert's, Inc.*, 107 N. L. R. B. No. 167, 33 L. R. R. M. 1240. These discretionary judgments carry no suggestion of doubt as to the Board's *statutory power* over such enterprises. They do, however, tend to minimize any importance that might otherwise inhere, for purposes of certiorari, in petitioners' attack upon the Board's prior judgment to exercise its statutory power over enterprises of this character.

2. Equally insubstantial as a basis for certiorari is petitioners' contention (S. Pet. 60–63; U. Pet. 5) that the Board in exercising its jurisdiction in this case has retroactively applied a jurisdictional standard adopted subsequent to the unfair labor practices in question. The vice in this contention is petitioners' assumption that the Board had, prior to the announcement of its

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Trial Examiner that [Stoller's] operations affect commerce within the meaning of the Act * * *" (R. 75). It was only following this finding that Stoller's interstate operations affected commerce within the meaning of the Act that the Board further concluded that Stoller's identification with the national defense program warranted "the full exercise of [the] power to assert the jurisdiction conferred on it by the Act." (R. 75.) Manifestly, there is no basis for petitioners' claim of a switch in jurisdictional theories.

administrative jurisdictional "yardsticks" (see note 2, p. 7, *supra*), declined to exercise its jurisdiction over enterprises like the one involved here. The Board has, however, exercised jurisdiction over laundry and dry cleaning enterprises like Stoller's since early in its history.[4] Accordingly, petitioners cannot complain that the unfair labor practices in this case were committed in reliance upon any policy of the Board to refrain from asserting the jurisdiction which it possessed. Cf. *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 13 (C. A. 1); *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 144–150 (C. A. 9). The jurisdictional standards the Board explained in October 1950 merely served to narrow the area over which the Board in its discretion would exercise its powers. The fact that the narrowing did not result in excluding petitioners from the jurisdiction the Board had always exercised affords no basis for their claim of retroactivity.

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[4] *Arcade-Sunshine Co.*, 12 N. L. R. B. 259, enforced, 118 F. 2d 49 (C. A. D. C.), certiorari denied, 313 U. S. 567 (1941); *Quality and Service Laundry, Inc.*, 39 N. L. R. B. 970, 972–973 (1942), enforced, 131 F. 2d 182 (C. A. 4), certiorari denied, 318 U. S. 775; *Star Dyers & Cleaners, Inc.*, 53 N. L. R. B. 514, 515 (1943); *H. B. Harwell*, 55 N. L. R. B. 845, 847–848 (1944); *Liberty Laundry Co.*, 62 N. L. R. B. 1235, 1236; *Sam Boorstein*, 64 N. L. R. B. 645, 646.

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for certiorari should be denied.

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FEBRUARY 1954.

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Nos. 541, 542

Supreme Court of the United States

OCTOBER TERM, 1953

HARVEY STOLLER d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, and LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION OF HARVEY STOLLER, *ET AL.*, FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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OCTOBER TERM, 1953

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*	

PETITION OF HARVEY STOLLER, ET AL., FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

The petition of Harvey Stoller d/b/a Richland Laundry and Dry Cleaners and Laundry and Dry Cleaners Union, Local 197, A.F.L., for a *writ of certiorari* directed to the Court of Appeals for the Ninth Circuit (which opinion below was reported at 207 F.(2d) 305 and in which opinion the decision of the National Labor Relations Board, 93 N.L.R.B. 680 was affirmed) was by this court denied March 8th, 1954.

This is a petition respectfully praying this court to reconsider its order denying, and to grant an order to issue, a writ in this case.

Petitioners are thoroughly conscious of the fact that petitions for rehearing are most strictly scrutinized and but rarely successful. With that consideration in mind,

petitioners feel, however, that it is by no means idle to bring to this court's attention certain intervening circumstances and events of most recent occurrence which, in petitioners' judgment, directly and substantially affect the merits of the problem outlined in our original petition for a writ.

The ground upon which we earnestly urge a rehearing is the action which the Board has recently taken—action taken in fact since the decision of the Court of Appeals below was issued. The Board has substantially altered its policy and has squarely repudiated the very principle upon which the *Stoller* decision was based. This leaves the *Stoller* decision to stand alone—a case *sui generis*. The vice inherent in this circumstance is the peculiar plight in which this action leaves Stoller and the other petitioners herein. Stoller's business is penalized. Everyone else in the same business, under similar circumstances, goes free of penalty. Stoller suffers a loss assessed against him by the Board in the amount of $8,000.00 while his competitor across the street, or in the same area, or for that matter in the same business elsewhere throughout the United States, enjoys immunity from such penalty. To the extent to which Stoller is deprived of $8,000.00, under a policy which the Board now admittedly repudiates and disavows, his competitors enjoy a corresponding and commensurate advantage. He is discriminated against; they are favored. Such a result is abhorrent to fundamental principles of justice. It is condemned by the principle that government, in its dealings with its citizens, shall operate under a uniform rule of law, equally and fairly applied, rather than under a case-to-case application,

based upon unpredictable agency whim, fancy or pleasure. To allow the decision below to stand would effectually be a reversion to the dictim of the Caesar's: *"Sic volo, sic jubeo."*

This is not a problem which concerns Stoller alone; it involves a principle of utmost and nation-wide importance to the complex and ever increasing administration of the National Labor Relation Board's procedure. It is a problem which, may we submit, should be settled by this court.

It is our position that the National Labor Relations Board has recently so substantially changed its policy as to constitute a complete and total repudiation of the result which it reached in the *Stoller* decision. In that decision it undertook to assert jurisdiction over a local laundry in Richland, Washington, no different in any respect than a dozen or more other local competing laundries in the area, and it grounded its jurisdiction upon the circumstance that Richland, Washington, is located within the Hanford Atomic Energy Project, and therefore a part of national defense. The Board went farther before the Court of Appeals for the Ninth Circuit, and undertook to base its jurisdiction upon a purely incidental circumstance involving the purchase of some $12,000 worth of soap and solvents outside the state of Washington. Otherwise, operation of the laundry in question was recognized to be overwhelmingly and preponderantly local in character. The opinion of the Ninth Circuit supports the Board in its position. Thus we have the employer, Stoller, in a class with a substantial number of other competitors where he,

alone, is singled out and subjected to a regimen whereby he is ordered to offer reinstatement, and to make back payments, to employes in an amount, including interest, of approximately $8,000.00.

Our argument that this constituted arbitrary and discriminatory treatment and that it was a violation of that fundamental fair play and equal treatment constituting the very essence of due process has, since the decision was handed down by the Board, been reinforced and fortified with noteworthy and controlling emphasis by reason of recent decisions of the Board under which it is clearly and unequivocally established that the Board now has withdrawn from exercising jurisdiction over local enterprises such as that of the petitioner Stoller. The result is and has been that Stoller has been invidiously singled out for federal or governmental action penalizing him in an amount of $8,000.00, while his competitors and all others engaged in pursuing similar activities under identical circumstances are exempted therefrom.

General counsel for the Board will not dispute the fact that the Board has definitely and objectively repudiated the policy which it undertook to apply to the *Stoller* case. In his brief, reciting our original petition in Cause 541 and 542, General Counsel admits that fact, citing cases, some of which we may summarize as *Taichert's, Inc.*, 107 N.L.R.B. 167, involving a small variety store in the Atomic Energy area at Los Alamos, New Mexico, as well as *Ideal Laundry & Dry Cleaners*, 107 N.L.R.B. 186, practically a counterpart of the facts of our case. Other recent decisions, not cited, underlin-

ing the purpose of the Board to avoid the assertion of such jurisdiction are *McArthur Jersey Farm Dairy, Inc.*, 107 N.L.R.B. 171, and *Rubino, et al., d/b/a Alpine Mill & Lumber Company*, 107 N.L.R.B. 172.

General counsel's position, as asserted in his brief, does not, we submit, meet the exigency of the problem we have posed. The fact that the Board, he asserts, has disavowed any repudiation of the arbitrary action taken in the *Stoller* case, minimizes the importance of the problem otherwise inhering herein, so as to obviate the propriety of a *writ of certiorari*. Surely the problem is here none the less important merely because the Board, having singled out Stoller for its penal action, promises not to repeat such arbitrary and discriminatory conduct again in any other case.

The question here reaches much beyond the perimeter of that narrow statement of the problem. It goes to whether or not the Board has the power on a case-by-case basis to single out "A" and to exempt "B." Under our system of jurisprudence, state or federal, are we not warranted in our view that every citizen in an identical category or within similar classifications is entitled to equal treatment and equal application of the law? Is the Board over and beyond the restraint of that salutary constitutional principle? It certainly cannot be said that this court regards the problem, when viewed from this aspect, as merely a minor, trivial matter, of no substantial national or public importance. This court has not hesitated in many outstanding and celebrated decisions to vindicate the right of the individual citizen to the full benefit of constitutional protection. This is true in civil right cases. It is true in cases involving freedom

of speech, freedom of religion, and a long line of cases within the last decade or two under the First, Fifth and Fourteenth Amendments. This court has thought it of such importance that it has most recently called upon the National Labor Relations Board to submit a report to it of its policy in respect to the issue herein outlined.

The Board's action in assessing a penalty against Stoller and other petitioners, while frankly declining to do so in many other identical or similar cases, must be rectified; otherwise, Stoller and petitioners necessarily stand to suffer irreparable injury. Petitioning union some time ago filed a petition for representation before the Board. Pending the disposition of this litigation, however, the Board declined to process the petition. Now, let us contemplate the serious anomaly in which petitioners find themselves. The Board has penalized petitioners by ordering reinstatement and $8,000.00 back pay but, in virtue of its new policy and recent decisions repudiating that action, is now compelled to refuse to recognize a petition for representation. Petitioners, therefore, are caught squarely between the upper and nether millstones. Nothing can extricate them except an authoritative definitory decision of this court.

Petitioner Stoller and the other petitioners in this cause have only one avenue of relief. They can look only for redress to this court. This court alone has the power to insure that this petitioner and others similarly affected throughout the United States shall be protected against arbitrary agency action—against case-by-case action—whereby the petitioner, for example, may today

be visited with a penalty from which his competitors are exempt; tomorrow it may be that he is exempt while they may be subjected to penalty. Certainly, where the Board, having acted solely against the petitioner, disavows similar action against his competitors, somewhere in our judicial sytsem there should be a remedy. Only this court can grant it and we respectfully urge the propriety of granting the petition in this matter, so that a uniform rule of law may be laid down whereby all affected by actual or potential power of an agency such as the National Labor Relations Board may have a clear definition both of their rights and of their remedies. Only by a decision of this court can the principle of uniformity in agency action, and particularly Board action quasi-judicial in nature, be assured. Only by a decision of this court can the petitioner and many others similarly circumstanced throughout the United States receive relief from discriminatory, arbitrary case-to-case action by the Board.

Respectfully submitted,

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